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APPENDIX

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MICHAEL BOGAK, JR., CLERK

in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

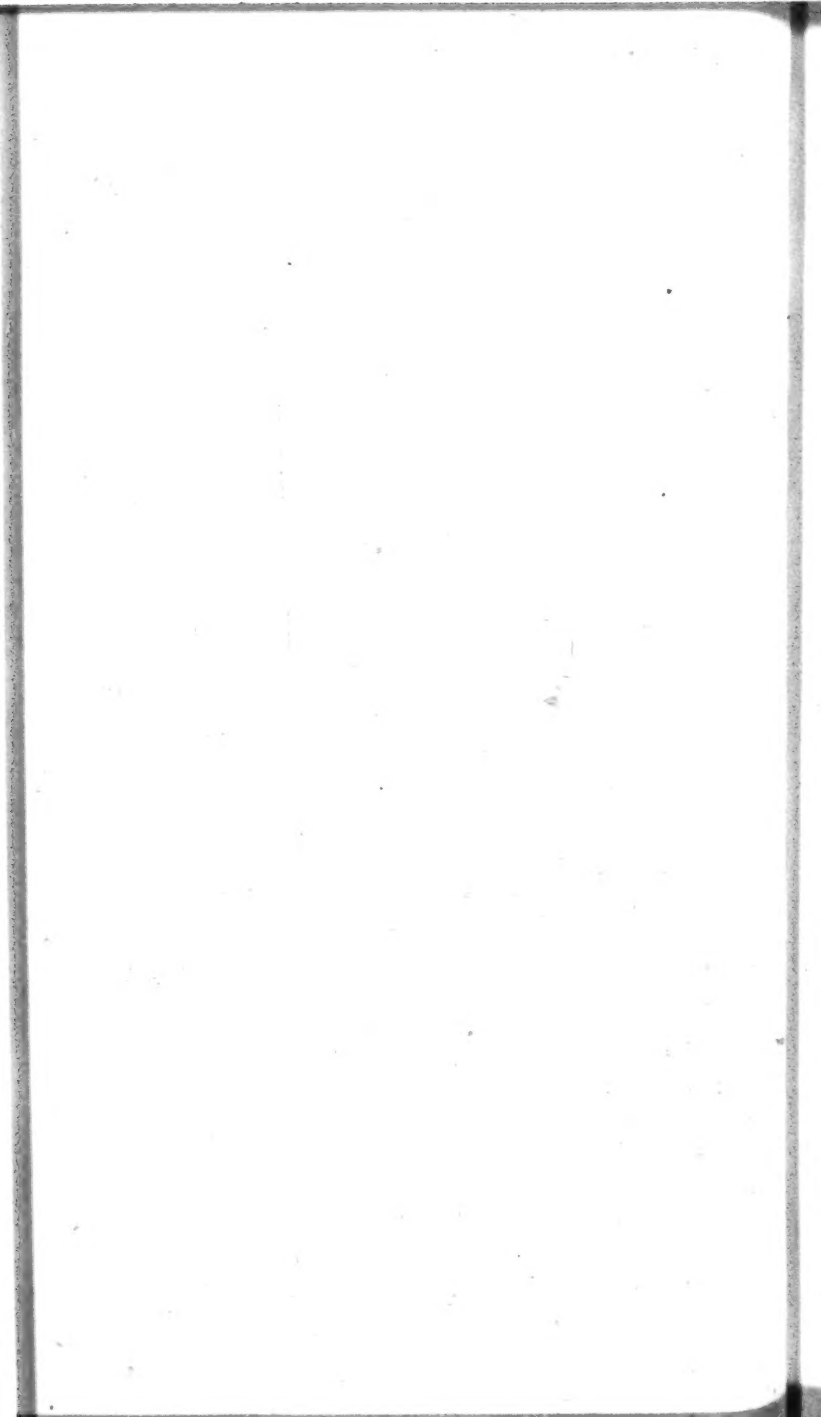
No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,
vs.

FARAH MANUFACTURING CO., INC.,
Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Fifth Circuit

Petition for Certiorari Filed October 31, 1972
Certiorari Granted April 23, 1973



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SA 70 CA 353

CIVIL DOCKET

UNITED STATES DISTRICT COURT

TITLE OF CASE

CECILIA ESPINOZA and husband,
RODOLFO ESPINOZA

vs.

FARAH MANUFACTURING COMPANY

CIVIL RIGHTS ACT:

Judgment in sum of \$31,468.00. For discrimination against Pltff in her efforts to obtain employment because of her national origin after making application with Deft

ATTORNEYS

For Plaintiff:

Ruben Montemayor

1414 Tower Life Bldg., San Antonio, Tex. 78205

For defendant:

Kenneth R. Carr

Box 9519, El Paso, Tex. 79985

GROCE, HEBDON, FAHEY & SMITH

911 Frost Bank Bldg., SA Texas 78205

By: Thomas H. Sharp, Jr.

KEMP, SMITH, WHITE, DUNCAN & HAMMOND

1500 First National Building

El Paso, Texas 79901

By: William Duncan

Statistical record

Costs

U.S. 5 mailed	JS-5	Clerk	15.00
U.S. 6 mailed		Marshall #2	4.92
Basis of Action		Docket fee	
		Witness fee	
Action arose at:		Depositions #8	60.80

(by Respt)

Date	Name or Receipt No.	Rec.	Disb.
9-18-70	Ruben Montemayor Judge Fee	15.00	
9-25-70	Deputy Treas. U.S.C.D. #13		15.00
		<hr/> 15.00	<hr/> 15.00
10-20-71	E. P. Faley	<hr/> 5.00	
10-22-71	C. D. #20		5.00
			<hr/> —0—

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

By: Mary Kirk

Deputy.

Date	Proceedings
9-18-70	1. Complaint, filed. (Copy to Judge Roberts) Summons, issued.
9-28-70	2. Summons re/ex 9-22-70 by Enriquez, Deputy
10- 1-70	3. Petnrs' First Amended Complaint, filed (Copy to Judge Roberts)
10-12-70	4. Answer, filed. (Copy to Judge Roberts)
10-23-70	5. Preliminary Order, filed. (Copies to Judge and all attys of record)=fm
11-23-70	6. Motion to Dismiss and for Judgment, filed. (Copy Judge Roberts)
11-23-70	7. Authorities in Support of Motion to Dis- miss and for Judg., filed. (Copy Judge R)
11-25-70	8. Deposition of Cecilia Espinoza, filed.
1-20-71	9. Order Granting Petnrs' Application for Leave to Amend First Amended Complaint, filed. (Copies to Judge and all attys)=fm
1-20-71	10. Petnrs' Second Amended Complaint, filed. (Copy to Judge Suttle)
2-19-71	11. Motion for Summary Judgment, filed. (copy Judge Suttle)
2-19-71	12. Affidavit of Pedro P. Billaverde, Jr. in Supp. of Deft's Motion for Summary Judgment, filed. (copy Judge Suttle)
2-19-71	13. Brief in Support of Deft's Motion for Sum- mary Judgment, filed. (copy Judge)
2-19-71	14. Stipulation, filed. (copy Judge Suttle)

- 2-19-71 15. Petitioners' First Set of Interro., filed.
(copy Judge Suttle)
- 3- 5-71 16. Motion for Extension of Time in Which to
File Objectiend or to Answer Interro, filed.
(copies Judge Suttle)
- 3- 8-71 17. Order Enlarging Time to File Objections
and to Anser Interro, filed. (copies Judge
Suttle, all attys)
- 3-29-71 18. Deft's Objections to Interro, filed. (copy
Judge Suttle)
- 3-29-71 19. Deft's Answers to Plntf's First Set of In-
terro, filed. (copy Judge Suttle)
- 5-10-71 20. Deft's Amended Answer to Plntf's First
Set of Interrog, filed. (copy Judge Suttle)
- 5-12-71 *** Hearing: Objections to Interrog. sttled be-
tween parties. Motion for Summ. Jdgmt.
heard and defts' Atty to submit brief with-
in 2 weeks, Plaintiff has 3 weeks to reply.
- 5-26-71 21. Supplemental Brief Supporting Deft's
Motion for Summ. Jdgmnt, filed. (copy
Judge)
- 6-21-71 22. Motion for Extension of Time in which to
file Summ. Jdgment, filed. (copy Judge)
- 6-21-71 23. Order Enlarging Time in which to file
Summ Jdgmnt & Brief, filed. (copies
Judge, all attys)
- 6-29-71 24. Motion for Summary Judgment, filed.
(copy Judge Suttle)

- 6-29-71 25. Brief in Support of Petitioners' Motion for Summ Jdgmnt, filed. (copy Judge)
- 9-21-71 26. Memorandum of Decision, filed. (copies judge, all attys)
- 9-21-71 27. Partial Judgment, filed. (copies Judge, all attys)
- 10-18-71 28. Notice of Appeal, filed. (copies Judge, Ct Reporter, N.O., Atty Montemayor)
- 10-18-71 29. Motion for Supersedeas, filed. (copy Judge Suttle)
- 10-18-71 30. Designation of Record for Appeal, filed. (copy Judge Suttle)
- 10-18-71 31. Bond for Costs, filed. (copy Judge Suttle)
- 10-20-71 32. Order Granting Supersedeas, filed. (copies Judge, all attys)
- 10-26-71 33. Supersedeas Bond, filed. (copy Judge Suttle)

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk

By: Mary Kirk

Deputy.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed Sept. 18, 1970]

COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now CECILIA ESPINOZA, and RODOLFO ESPINOZA, hereinafter styled Plaintiffs complaining of FARAH MANUFACTURING CO., hereinafter styled Defendant, and for their cause of action would respectfully show unto the Court the following, to-wit:

I.

That Plaintiff, CECILIA ESPINOZA, is a legal permanent resident immigrant of the United States of America and a resident of the City of San Antonio, County of Bexar, State of Texas; and that Plaintiff RODOLFO ESPINOZA, is a citizen of the United State of America and a resident of the City of San Antonio, County of Bexar, State of Texas.

II.

Defendants are now, and at all times material hereto, have been a duly organized corporation organized and existing under the laws of the State of Texas, and having a place of business in the City of San Antonio, County of Bexar, State of Texas.

III.

This action under the United States Constitution, particularly under the provisions of the Fifth Amendment to the Constitution of the United States, and other federal law, particularly the Civil Rights Act, Title 42, United States Code, Section 2000 e-2(a) jurisdiction is conferred on the Court under Title 42 United States Code, Section 2000 e-5 (f).

IV.

That Plaintiff, CECILIA ESPINOZA, was discriminated against in her efforts to obtain employment because of her national origin on July 19, 1969, after making an application with the aforementioned Defendant. And that as a consequence of said discrimination the Plaintiff has suffered loss of earnings, great humiliation, shame, inconvenience, and mental suffering all to her damage in the sum of THREE THOUSAND NINE HUNDRED SIXTY-EIGHT (\$3,968.00) DOLLARS, and further punitive damages in the sum of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS. That Plaintiff is entitled by virtue of said statute to an award of actual and punitive damages.

V.

That Plaintiff has incurred reasonable attorney's fees in the sum of TWO THOUSAND FIVE HUNDRED (\$2,500.00) DOLLARS in connection with these proceedings.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray that this Court enter a judgment or decree declaring that such employment practices as exercised by the Defendant are unlawful and in violation of the Fifth Amendment to the Constitution of the United States and in violation to Title 42, United States Code, Section 2000 e-2(a); That Plaintiff recover judgment of and from the Defendant in the sum of THREE THOUSAND NINE HUNDRED SIXTY-EIGHT (\$3,968.00) DOLLARS in actual damages, TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS in punitive damages with statutory interest as allowed by law, and TWO THOUSAND FIVE HUNDRED (\$2,500.00) DOLLARS for reasonable attorney's fees; That this Court enter a judgment ordering the Defendant to hire the Plaintiff; and that the Court allow them their costs therein and such further, other, additional, or alternative relief as may appear to the Court to be equitable and just.

SIGNED on this the 18th day of September, A.D., 1970.

Respectfully submitted,

/s/ Ruben Montemayor

RUBEN MONTEMAYOR
Attorney for Plaintiffs
1414 Tower Life Building
San Antonio, Texas 78205
224-5471

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed Oct. 1, 1970]

PETITIONERS' FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CECILIA ESPINOZA, and RODOLFO ESPINOZA, as husband and wife, hereinafter styled Petitioners complaining of FARAH MANUFACTURING CO., hereinafter styled Respondent, and for their cause of action would respectfully show unto the Court the following, to-wit:

I.

That Petitioner, CECILIA ESPINOZA, is a legal permanent resident immigrant of the United States of America and a resident of the City of San Antonio, County of Bexar, State of Texas; and that Petitioner RODOLFO ESPINOZA, is a citizen of the United States of America and a resident of the City of San Antonio, County of Bexar, State of Texas.

II.

Respondents are now, and at all times material hereto, have been a duly organized corporation organized and existing under the laws of the State of Texas, and having a place of business in the City of San Antonio, County of Bexar, State of Texas.

III.

This action under the United States Constitution, particularly under the provisions of the Fifty Amendment to the Constitution of the United States, and other federal law, particularly the Civil Rights Act, Title 42, United States Code, Section 2000 e-2 (a); jurisdiction is conferred on the Court under Title 42, United States Code, Section 2000 e-5 (f).

IV.

That Petitioner, CECILIA ESPINOZA, was discriminated against in her efforts to obtain employment because of her national origin on July 19, 1969, after making an application with the aforementioned Respondent. And that as a consequence of said discrimination the Petitioners have suffered loss of earnings, their damage in the sum of THREE THOUSAND NINE HUNDRED SIXTY-EIGHT (\$3,968.00) DOLLARS, and further punitive damages in the sum of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS. That Petitioners are entitled to an award of actual and punitive damages.

V.

That Petitioners have incurred reasonable attorney's fees in the sum of TWO THOUSAND FIVE HUNDRED (\$2,500.00) DOLLARS in connection with these proceedings.

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray that this Court enter a judgment or decree declaring that such employment practices as ex-

exercised by the Respondent are unlawful and in violation of the Fifth Amendment to the Constitution of the United States and in violation to Title 42, United States Code, Section 2000 e-2(a); that Petitioners recover judgment off and from the Respondent in the sum of THREE THOUSAND NINE HUNDRED SIXTY-EIGHT (\$3,968.00) DOLLARS in actual damages, TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS in punitive damages with statutory interest as allowed by law, and TWO THOUSAND FIVE HUNDRED (\$2,500.00) DOLLARS for reasonable attorney's fees; that this Court enter a judgment order the Respondent to hire the Petitioner, CECILIA ESPINOZA; and that the Court allow them their costs therein and such further, other additional, or alternative relief as may appear to the Court to be equitable and just.

SIGNED ON this the 30th day of September, A.D. 1970.

Respectfully submitted,

/s/ Ruben Montemayor

RUBEN MONTEMAYOR

Attorney for Petitioners

1414 Tower Life Building

San Antonio, Texas 78205

224-5471

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed October 1, 1970]

PETITIONERS' FIRST AMENDED COMPLAINT
TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CECILIA ESPINOZA and RODOLFO ESPINOZA, Petitioners in the above styled and numbered cause and amend their complaint by substituting the attached re-cast complaint in lieu of the prior complaint and pray that this amendment be allowed.

SIGNED on this the 30th day of September, A.D., 1970.

/s/ Ruben Montemayor

RUBEN MONTEMAYOR
Attorney for Petitioners
1414 Tower Life Building
San Antonio, Texas 78205
224-5471

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed October 12, 1970]

ANSWER

Comes now FARAH MANUFACTURING COMPANY, defendant herein, and files this its original answer to the first amended complaint and by way of answer would respectfully show the following:

FIRST DEFENSE

The complaint should be dismissed for failure to state a cause of action against defendant.

SECOND DEFENSE

The complaint of plaintiffs, Rudolfo Espinoza and Cecilia Espinoza, should be dismissed since no allegation of discrimination or other acts are alleged to have been committed by defendant as to said plaintiffs and no cause of action as to said plaintiffs is stated.

THIRD DEFENSE

The complaint of plaintiffs should be dismissed since said plaintiffs were not parties to the administrative proceedings before the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, a condition precedent to suit under Section 706(e) of Title VII of the Civil Rights Act of 1964 (42 U.S. Code §2000e5).

FOURTH DEFENSE

By way of specific answer to the allegations of the complaint, defendant pleads as follows:

I.

Defendant has no knowledge upon which to either admit or deny the allegations of Paragraph I of the first amended complaint relating to plaintiffs' status as a permanent resident, alien or resident of Bexar County, Texas, or the status of plaintiff Rudolfo Espinoza as a citizen of the United States and resident of Bexar County, Texas, and the same are therefor denied.

II.

In answer to Paragraph II of the first amended complaint, defendant admits that it is a corporation authorized to do business in the State of Texas and that it has a place of business in San Antonio, Texas.

III.

In answer to Paragraph III of the first amended complaint, defendant denies that plaintiffs have any cause of action or that this court has any jurisdiction in this case by virtue of the Fifth Amendment to the United States Constitution and "other federal law." Defendant further denies that this court has any jurisdiction by virtue of the provisions of 42 U.S. Code §2000e et. seq., since plaintiffs' suit was not filed and served within the time limits set forth in Section 706 (42 U.S. Code §2000e5) of said act, a condition precedent to suit.

IV.

Defendant denies the allegations of Paragraph IV of the complaint. Defendant specifically denies that plaintiffs are entitled to any monetary damages for "loss of earnings, great humiliation, shame, inconvenience and mental suffering," as alleged, and further denies that Title VII of the Civil Rights Act of 1964 authorizes the award of any damages.

V.

Defendant denies the allegations of Paragraph V of the complaint.

WHEREFORE, premises considered, defendant prays that the first amended complaint herein be dismissed in its entirety, that the defendant recover reasonable costs of suit, including reasonable attorney's fees, or, alternatively, that the complainant be denied the relief sought and take nothing herein, and that defendant have such other and further relief, general and special, to which it might show itself justly entitled.

Respectfully submitted,

KENNETH R. CARR

P. O. Box 9519

El Paso, Texas 79985

KEMP, SMITH, WHITE,

DUNCAN & HAMMOND

1500 First National Building

El Paso, Texas 79901

and

GROCE, HEBDON, FAHEY &
SMITH

By /s/ Thomas H. Sharp, Jr.

Thomas H. Sharp, Jr.

911 Frost Bank Building

San Antonio, Texas 78205

ATTORNEYS FOR

DEFENDANT

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed October 23, 1970]

PRELIMINARY ORDER

Issue having been joined herein, the Court makes the following ORDER:

(1) In making jury requests, strict compliance with Rule 38(b), Federal Rules of Civil Procedure, will be required.

(2) Except as provided in Rule 15(a), Federal Rules of Civil Procedure, no amendment of pleadings will be filed without leave of Court or written consent of the adverse party.

(3) Discovery is to begin immediately and must be concluded by March 23, 1971. The Court reminds attorneys of the importance and benefits of discovery. See *Hickman v. Taylor*, 329 U.S. 495; 4 MOORE'S FEDERAL PRACTICE 1014-1016. The Court further reminds attorneys of the consequences of the refusal to make discovery. See Rule 37, Federal Rules of Civil Procedure.

(4) A preliminary pre-trial conference between attorneys, to be arranged by plaintiff's attorney, is to be held by April 23, 1971. The purpose of this conference is to take care of certain preliminary matters as indicated in the enclosed self-explanatory form to be signed by the attorneys

following the conference. If there are any problems concerning these matters that cannot be worked out between the attorneys, ten (10) days will be given to file any motions. All motions must have a memorandum of authorities in support thereof. The opposing party to the motion will have seven (7) days to reply, the reply also requiring memorandum of authorities. All motions will be determined on the moving papers unless the Court requests oral argument.

(5) Sanctions for failing to comply with pre-trial directions will be enforced. See Rule 41(b), Federal Rules of Civil Procedure.

Entered this 23d day of October, 1970, at Austin, Texas.

/s/ Jack Roberts

JACK ROBERTS

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed November 23, 1970]

MOTION TO DISMISS AND FOR JUDGMENT

Comes now FARAH MANUFACTURING COMPANY and moves the Court under Rule 12 to dismiss the captioned cause for lack of jurisdiction over the subject matter and to grant Defendant judgment on the pleadings, and would show:

I.

It is clear from the Plaintiffs' pleading that no loss supports recovery under the claim made and it appears to a certainty that Plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim, since Plaintiffs' entire complaint is grounded on the theory that giving employment preference to American citizens is unlawful.

II.

Judgment for Defendant on the pleadings is sustained by the undisputed facts appearing in the complaint, which are taken as true for purpose of this motion.

WHEREFORE, Defendant prays for an Order dismissing Plaintiffs' complaint for failure to state a claim upon which relief can be granted and for judgment in its

favor providing that Plaintiffs' take nothing, for its costs,
and for general relief.

Respectfully submitted,

KENNETH R. CARR
P. O. Box 9519
El Paso, Texas 79985

KEMP, SMITH, WHITE,
DUNCAN & HAMMOND
1500 First National Building
El Paso, Texas 79901

By /s/ Jack Ratliff

JACK RATLIFF
GROCE, HEBDON, FAHEY &
SMITH

By /s/ Thomas H. Sharp, Jr.

THOMAS H. SHARP, JR.
911 Frost Bank Building
San Antonio, Texas 78205
Attorneys for Defendant

[Certificate of Service Omitted]

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

[TITLE OMITTED]

[Filed November 23, 1970]

**AUTHORITIES IN SUPPORT OF MOTION TO
DISMISS AND FOR JUDGMENT**

Plaintiffs' complaint is based on the erroneous assumption that an employer may not prefer American citizens in hiring. That theory runs contrary to the obvious Congressional intent embodied in the Civil Rights Act of 1964, to the clear implications found in the case law, and to the interpretation long given the term "national origin" by the United States Government itself.

Title VII of the Civil Rights Act of 1964, 42 USC Sec. 2000e-2 prohibits certain unlawful employment practices. It provides that it shall be unlawful for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

CECILIA ESPINOZA asserts that she was denied employment because she is an alien, an assertion taken as true for the purposes of this Motion. The question is whether such a denial discriminates against Mrs. Espinoza because of her "national origin." It is not contended, nor can it be, that Farah discriminates against American citizens of Mexican descent.

The Regional Director of the Equal Employment Opportunity Commission has, pursuant to 29 C.F.R. Sec. 1601, made Findings of Fact based upon Cecilia Espinoza's EEOC Charge. Although 29 C.F.R. Sec. 1601.19b prescribes the method for excepting to said Findings of Fact, no such exception was taken by said Plaintiff. Those Findings, a copy of which is attached hereto and made a part hereof for all purposes, demonstrate conclusively that Plaintiff was not discriminated against by virtue of the fact that her national origin is Mexico. For example, they demonstrate that 95% of Farah's employees in San Antonio are Spanish-surnamed; that Plaintiff's sister-in-law, who is also Spanish-surnamed, is employed by Farah, and that the individuals hired for the position Plaintiff was seeking were themselves Spanish-surnamed. Finally, Regional Director found, without exception, that:

"The evidence in the record does not establish that Respondent [Farah] refused to employ Charging Party [Plaintiff] because she is Spanish Surnamed."

Plaintiffs rely heavily on guidelines issued by the EEOC which, erroneously and without foundation in law, declare that, absent a national security consideration, an employer may not prefer his fellow citizens over aliens in hiring. See EEOC Guidelines in CCH Employment Practices Guide, Volume 2, Para. 16,908, Sec. 1606.1(d).

The case appears to be one of first impression, though numerous cases (cited below) clearly show that by "national origin" Congress intended a person's ancestry or historical origin, and not his citizenship. The clearest indication of Congressional intent, however, is provided by

the Federal Government itself. The Civil Service statute specifically precludes discrimination on the basis of "national origin":

"It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin. The President shall use his existing authority to carry out this policy. 5 U.S.C. Sec. 7151. (All emphases in this brief added unless noted otherwise.)

Nevertheless, the Civil Service Commission, with obvious Congressional approval, employs only United States citizens. See Federal Personnel Manual, Chapter 338, Subchapter 1, Paragraph 1-1, Sub-sections A and B.

Furthermore, Presidential Executive Order 11478 (CCH Employment Practices Guide, Para. 16,050) provides:

"Sec. 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, or national origin, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 4. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, color, religion, sex, or national origin. Agency systems shall provide access to counseling for employees who feel aggrieved and shall encourage the resolution of employee problems on an informal basis. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission."

It is clear, therefore, that the hiring policies of our own Government reflect both an overwhelming concern for fairness in employment and a requirement that only citizens be employed. The Government may not discriminate on the basis of "national origin," but clearly can and does forbid employment to aliens.

It is clear, therefore, that discrimination on the basis of citizenship is not understood by Congress to be the same as discrimination on the basis of "national origin," as contended by Plaintiffs. That position is manifestly inconsistent with Congressional intent, as indicated in 5 U.S.C. Sec. 7151, when compared with the long-standing policies of the Civil Service Commission. Certainly Congress did not intend to create more stringent requirements for private employers than those it imposes upon the Federal Government itself. If Congress had meant to prevent discrimination on the basis of citizenship, it could have done so by the inclusion of that word in the statute.

While dictionary definitions are not necessarily controlling, they offer some suggestion as to the Congressional intent. Webster defines origin as "ancestry, parentage, beginning, derivation from a source or primary source of cause." Thus it seems obvious that national origin means the country from which a person is derived, either through birth or parentage.

While the case law is sketchy at best, the following cases illustrate that disputes under the national origin provision of the Civil Rights Act give "national origin" its reasonable meaning, related to derivation and not to citizenship. Thus in *Gnotta v. United States*, 415 F.2d 1271 (8th Cir. 1969), an employee of the U.S. Army Corps of Engineers, born in the United States, but of Italian ancestry, claimed that he was discriminated against because of his ancestry. There was never an allegation that national origin meant anything but his Italian ancestry. Of course the question of citizenship never arose because the plaintiff was a United States citizen. Mr. Justice Blackmun, now on the Supreme Court of the United States, discussed the plaintiff's ancestry. He indicated that the plaintiff was born of "Italian parents in Kansas City, Missouri." He later refers to witnesses "some of them of obvious Italian descent" who testified that they did not think the plaintiff suffered discrimination because of national origin. The witnesses also testified that there was "no discrimination against Italians in the Corps." It would seem that all parties, the court, and the Justice writing the opinion, now on the United States Supreme Court, never considered national origin to mean anything other than the country of the plaintiff's descent.

In EEOC Case Number CL 68-12-431EU, 2 F.E.P. Cas. 295, the EEOC found that there was reasonable cause to believe that an employer had violated Title VII of the Civil Rights Act by permitting job harassment of a foreign-born employee because of his national origin. The charging party was born in Poland and entered the United States in 1956. It does not indicate whether the charging party was a citizen of the United States. He complained of being the butt of "Polish jokes" among other shop employees, including those also of Polish descent, who laced other witticisms with vulgar Polish names and generally derogatory remarks about his ancestry. The Commission found that the telling of Polish jokes was common in the shop and other employees of Polish descent took such jests good-naturedly. The Commission later said that it "cannot regard the tolerance of ridicule of national origin as either a common or allowable condition of employment." Throughout the remainder of the digested opinion, the Commission refers to the charging party as of Polish descent and being foreign-born. There is never any question about citizenship.

In *Chavez v. Rust Tractor Co.*, 2 F.E.P. Cas. 339 (D.N.M. 1969), the court considered a case brought by a Spanish-surnamed former employee alleging discrimination on the basis of national origin. The plaintiff alleged that he had been laid off because the employer did not like persons of "Spanish-American descent." The Commission investigated the complaint, and found, "Reasonable cause exists to believe that the Respondent has engaged in the unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, by discharging the Charging Party because of his National Origin, (Spanish surnamed American)." The court found that there had been only ten Spanish-surnamed Americans discharged during

the period in question. It held that plaintiff failed to establish that there exists in fact "a class of persons in the form of Spanish surnamed Americans who have applied for employment with Defendant since July 2, 1965, to date and who have been denied employment by Defendant." The point is that neither the Commission nor the court ever thought of national origin being anything other than the country from which the Plaintiff was descended. In *Motorola, Inc. v. EEOC*, F.E.P. Cas. 407 (D. Ariz. 1969), the court again considered a charge of discrimination based upon national origin. Again the case involved Spanish-surnamed persons. Once again, neither the court nor the Commission considered national origin to be anything other than the country from which the plaintiff was descended.

Though the opinion is not entirely clear, *LaBierre v. Massachusetts Comm'n Against Discrimination*, 236 N.E. 2d 192, 354 Mass. 165, suggests that "national origin" is something entirely different from citizenship.

The case of *Vogler v. McCarty, Inc.*, 2 F.E.P. Cas. 491, ___F.Supp.___ (E.D. La., Feb. 19, 1970) is informative. There, a union which was found in prior proceedings to discriminate in referrals against Negroes in violation of Title VII of the Civil Rights Act of 1964 was ordered to implement certain criteria for membership. Those included, as qualifications, the following:

"B. Citizenship. An applicant must be an American or Canadian citizen or be one not later than five years after the date of admission to the local union."

The ruling demonstrates that the favoring of American citizens in employment is not a violation of the Act and that the Federal Courts charged with interpretation of the Act do not so regard it. See 294 F.Supp. 368 (1968) and 407 F.2d 1047 (5th Cir., 1969) for background. The decision is based, in part, on discrimination against persons with Spanish surnames because of "national origin" which the District Court finds to be something other than citizenship.

Because of the foregoing authorities, Defendant prays for an Order dismissing Plaintiffs' complaint and for judgment on the pleadings herein.

Respectfully submitted,

KENNETH R. CARR

P. O. Box 9519

El Paso, Texas 79985

KEMP, SMITH, WHITE,
DUNCAN & HAMMOND
1500 First National Building
El Paso, Texas 79901

By /s/ Jack Ratliff

JACK RATLIFF

THOMAS H. SHARP, JR.
GROCE, HEBDON, FAHEY &
SMITH
911 Frost Bank Building
San Antonio, Texas 78205

[Certificate of Service Omitted]

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION REGIONAL OFFICE**

**300 E. 8th Street
Austin, Texas 78701
Area Code 512 475-5811**

REGIONAL DIRECTOR'S FINDING OF FACT

**Cecelia (Rudolfo) Espinoza
Charging Party
vs.**

Case No. YAUO-196

**Farah Manufacturing Co., Inc.
San Antonio, Texas
Respondent**

Date of alleged violation: July 19, 1969
Date of filing of charge: August 11, 1969
Date of service of charge: February 12, 1970

- 1. The Charging Party alleges that the Respondent employer has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire her because of her national origin (Spanish Surnamed — not a United States citizen). The Respondent denies the charge.**
- 2. The Respondent's San Antonio plant employs about 625 persons, of whom ninety-five percent are Spanish Surnamed Americans.**
- 3. The Respondent engages in the manufacturing of clothing, an industry affecting commerce.**

4. The Charging Party, a Spanish Surnamed female, states that she is not a citizen of the United States, although she is married to a citizen and is a resident of San Antonio, Texas.
5. The Charging Party states that on July 19, 1969, she applied for employment by the Respondent as a machine operator; that she was not hired, and that the reason given her was that she is not a citizen of the United States.
6. The Respondent's president and its attorney of record stated that the Respondent has historically enforced an unwritten company policy to hire only persons who are citizens of the United States. These officials gave no reason for the existence of this policy.
7. The Respondent's president stated that there has been one exception to this policy, but he refused to furnish the investigator with the name of such employee.
8. The Charging Party's sister-in-law, a Spanish Surnamed United States citizen, is employed by Respondent.
9. The Charging Party stated that she believed that the persons hired instead of her were Spanish Surnamed citizens of the United States.
10. The evidence in the record does not establish that Respondent refused to employ Charging Party because she is Spanish Surnamed.

11. The Resident Employer rejects those applicants for employment who are not United States citizens.
12. The Respondent refused to employ the Charging Party because she is not a citizen of the United States.
13. There is no evidence in the record that the Respondent's policy of employing only citizens of the United States is related to the interests of national security.

May 8, 1970

Date

/s/ Lee G. Williams

Lee G. Williams
Regional Director
Austin Regional Office

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed January 20, 1971]

ORDER

ON THIS THE 20th day of January, 1971, the Petitioners appeared by their attorney, and made application wherein the said CECILIA ESPINOZA, and RODOLFO ESPINOZA, respectfully move the Court for leave to amend their First Amended Complaint.

Application having been heard and considered by the Court, the same is hereby granted.

/s/ D. W. Suttle

JUDGE PRESIDING

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed January 20, 1971]

PETITIONERS' SECOND AMENDED COMPLAINT
TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CECILIA ESPINOZA, and RODOLFO ESPINOZA, Petitioners in the above styled and numbered cause, and by and through their attorney, RUBEN MONTEMAYOR, moves the Court for leave to amend their First Amended Complaint, a copy of said amendment being attached hereto, upon the grounds of Rule 15, Federal Rules of Civil Procedure.

SIGNED on this the 20th day of January, A.D., 1971.

/s/ Ruben Montemayor

RUBEN MONTEMAYOR
Attorney for Petitioners
1414 Tower Life Building
San Antonio, Texas 78205
512 224-5471

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed Jan. 20, 1971]

PETITIONERS' SECOND AMENDED COMPLAINT
TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now, CECILIA ESPINOZA, and RODOLFO ESPINOZA, as husband and wife, hereinafter styled Petitioners complaining of FARAH MANUFACTURING CO., hereinafter styled Respondent, and for their cause of action would respectfully show unto the Court the following, to-wit:

I.

That Petitioner, CECILIA ESPINOZA, is a legal permanent resident immigrant of the United States of America and a resident of the City of San Antonio, County of Bexar, State of Texas; and that Petitioner RODOLFO ESPINOZA, is a citizen of the United States of America and a resident of the City of San Antonio, County of Bexar, State of Texas.

II.

Respondents are now, and at all times material hereto, have been a duly organized corporation organized and existing under the laws of the State of Texas, and having

a place of business in the City of San Antonio, County of Bexar, State of Texas, and that said Respondent comes within the meaning of Title 42, U.S. Code, Section 2000 e-(b) in that the said Respondent is engaged in an industry affecting commerce and employs at least twenty-five (25) persons.

III.

This suit is one in equity authorized and instituted pursuant to Title 42, U.S. Code, Title 42, U.S. Code, Section 2000 e-2(a). Jurisdiction is conferred on this Court under Title 42, U.S. Code, Section 2000 e- 5(f).

IV.

That Petitioner, CECILIA ESPINOZA, was discriminated against in her efforts to obtain employment because of her national origin on July 19, 1969, after making an application with the aforementioned Respondent. That said discrimination is in violation of the Federal Law mentioned in paragraph III above, and that as a consequence thereof, the Petitioner has suffered loss of earnings at a

rate of \$1.60 per hour. That Petitioners are entitled to back pay according to Title 42, U.S. Code, Section 2000 e- 5(g).

V.

That as a result of Respondent's unlawful employment practices, the Petitioners have incurred reasonable attorney's fees in the sum of TWO THOUSAND FIVE HUNDRED (\$2,500.00) DOLLARS, and that said Peti-

tioners are entitled to reasonable attorneys fees according to Title 42, U.S. Code, Section 2000 e- 5(k).

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray that this Court enter a Judgment or Decree declaring that such employment practices as exercised by the Respondent are unlawful and in violation of Title 42, U.S. Code, Section 2000 e- 2(a); that Respondent be permanently enjoined from such unlawful employment practices; that Petitioners recover judgment off and from the Respondent for all back pay to date; for reasonable attorney's fees in the amount of TWO THOUSAND FIVE HUNDRED (\$2,500.00) DOLLARS; and that the Court allow them their costs therein and for such further, other additional, or alternative relief, as may appear to the Court to be equitable and just.

SIGNED on this the 18th day of January, 1971.

Respectfully submitted,

/s/ Ruben Montemayor

RUBEN MONTEMAYOR

Attorney for Petitioners

1414 Tower Life Building

San Antonio, Texas 78205

512 224-5471

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

[TITLE OMITTED]

[Filed Feb. 10, 1971]

MOTION FOR SUMMARY JUDGMENT

Comes now Defendant, FARAH MANUFACTURING COMPANY, INC., and moves the Court, pursuant to Rule 56 of the Rules of Civil Procedure, to enter judgment for Defendant dismissing the action on the grounds that there is no genuine issue as to any material fact in the action and that Defendant is entitled to a judgment as a matter of law. As appears from the pleadings, Plaintiff's deposition, and the affidavit of PEDRO P. VILLAYERDE, JR., Secretary of Defendant corporation, attached hereto and made a part hereof, it is uncontradicted that Defendant, in refusing to hire Plaintiff because she is not a United States citizen, does not discriminate on the basis of national origin, and is therefore not in violation of Title VII of the Civil Rights Act of 1964, 42 USC §2000e-2.

Defendant requests oral argument.

DATED February 10, 1971.

KENNETH R. CARR
P. O. Box 9519
El Paso, Texas 79985

THOMAS H. SHARP, JR.
Groce, Hebdon, Fahey & Smith
911 Frost Bank Building
San Antonio, Texas 78205

KEMP, SMITH, WHITE,
DUNCAN & HAMMOND
1500 First National Building
El Paso, Texas 79901

By William Duncan

WILLIAM DUNCAN

By /s/ Jack T. Chapman

JACK T. CHAPMAN
Attorneys for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed Feb. 10, 1971]

**AFFIDAVIT OF PEDRO P. VILLAYERDE, JR. IN
SUPPORT OF DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

Pedro P. Villaverde, Jr., being duly sworn, deposes
and says:

I.

I am Secretary of FARAH MANUFACTURING
COMPANY, INC., Defendant in the above entitled and
numbered cause, and I have personal knowledge of each
and every fact hereinafter stated. I reside in the City of
El Paso, Texas.

II.

I have a Spanish surname, and my national origin is Mexico. I am a citizen of the United States of America.

III.

FARAH MANUFACTURING COMPANY, INC. has plants located in El Paso, Texas, San Antonio, Texas and Victoria, Texas. The events complained of in the captioned case occurred at Defendant's plant in San Antonio, Texas.

IV.

Defendant has a long standing and firm policy of hiring individuals without regard to their national origin, but with the requirement that they be citizens of the United States of America, either by birth or naturalization.

V.

At the time of the alleged violation in this case, July 19, 1969, Farah employed 7671 persons, all United States citizens, 7095 (or 92.5 percent) of whom are of Mexican origin. At the San Antonio facility, on the same date, Farah employed 869 persons, 837 (or 96.3 percent) of whom are of Mexican origin.

VI.

Farah's 1969 Employment Report Form EEO-1 to the Joint Reporting Committee, which includes the Equal Employment Opportunity Commission, was based upon payroll data for the payroll period ending March 19, 1969.

The information contained on that form is accurate. As of March 19, 1969, Farah employed 7594 persons, 7079 (or 93.2 percent) of whom are of Mexican origin. The San Antonio plant, as of that date, employed 625 persons, 609 (or 97.4 percent) of whom are of Mexican origin. Of the 589 people doing the type of work for which Plaintiff applied, 580 (or 98.5 percent) are of Mexican origin.

Farah's 1970 EEO-1 Form was based upon payroll data for the payroll period ending March 18, 1970. The information contained on that form is also accurate. As of March 18, 1970, Farah employed 7768 persons, 7174 (or 92.4 percent) of whom are of Mexican origin. The San Antonio plant, as of that date, employed 1158 persons, 1120 (or 96.7 percent) of whom are of Mexican origin. Of the 1117 people doing the type of work for which Plaintiff applied, 1087 (or 97.3 percent) are of Mexican origin.

Further Affiant saith not.

/s/Pedro P. Villaverde, Jr.

Pedro P. Villaverde, Jr.

SUBSCRIBED and SWORN before me this 20th day of January 1971 by Pedro P. Villaverde, Jr.

/s/ Lucio G. Salgado

Notary Public in and for
El Paso County, Texas.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed Feb. 19, 1971]

PETITIONERS' FIRST SET OF INTERROGATORIES

Now comes CECILIA ESPINOZA, and RODOLFO ESPINOZA, Petitioners in the above styled and numbered cause, by and through their Attorney, RUBEN MONTE-MAYOR, and file the following Interrogatories to be answered under oath by the Respondent pursuant to Rule 33 of the Federal Rules of Civil Procedure.

Unless a contrary meaning appears in context, the following definitions apply:

A. Company refers to FARAH MANUFACTURING COMPANY, its officers, agents, and employees.

B. Petitioner and/or Applicant refers to Mrs. CECILIA ESPINOZA.

1. What is the address and location of the Company's main office?
2. What is the address and location of the Company's branch office located in the County of Bexar, State of Texas?
3. What is the nature or type of business conducted by the Company?

4. Does the Company maintain any other operations or facilities in the State of Texas other than those mentioned in Interrogatory Nos. 1 and 2 above?

5. Is the Company's San Antonio Branch Office under the direct supervision and control of the main office located in El Paso, Texas?

6. What are the names, addresses, and responsibilities of all officers of the Company who are located at the Company's main office?

7. What are the names, addresses, and responsibilities of all officers who are located in the Company's branch office in the County of Bexar, State of Texas?

8. What specific operations are carried on at each of the offices, branches, district offices or plants of the Company?

9. Is the Company an employer with the meaning of Title 42, United States Code, Section 2000 e-(b)?

10. What are the names, addresses of the persons with the Company who either have or had duties connected with the attraction, screening, or hiring of job applicants?

11. With regard to those persons listed in the answer of Interrogatory No. 10, what are or were the duties and responsibilities of each such person?

12. By what means does the Company advertise for job applicants to fill new vacancies?

13. With reference to Interrogatory No. 12, please attach a copy of each employment advertisement for vacancies for a new Sewing Machine Operator published in any newspaper bulletin, or trade journal, between January 1, 1969, and the date of receipt of these Interrogatories?

14. What are the addresses and locations of those employment offices which have either employed or referred for employment any job applicant for Sewing Machine Operator with the Company since January 1, 1969?

15. With respect to each person interviewed for employment by the Company for the position of Sewing Machine Operator at any time since January 1, 1969:

a. What are the names, national origins, dates of application of each such person?

b. For each person listed in response to (a) above, which person from the Company conducted the interviews?

c. If during the application-interview process any oral or written examination was given to those persons described in (a) above, what type and form of test was given and what was the result for each applicant?

d. What educational or previous work experience or health qualifications were made known to the Company about each of these applicants?

e. What disposition was made by the Company of each application?

f. What were the specific reasons for either hiring or not hiring each applicant?

16. What are the duties performed by the employees in the position of Sewing Machine Operator?

17. What are the starting wages for the position of Sewing Machine Operator?

18. For an employee performing satisfactorily, what are the promotional opportunities and wage increases offered by the Company over a period of one year or more?

19. Do your Company records reflect an application made by Mrs. CECILIA ESPINOZA, Petitioner, on or about July 19, 1969, for the position of Sewing Machine Operator?

20. If so, please attach a copy of said application.

21. What was the disposition of said application and state the reasons thereof?

22. Is the application form used by the Petitioner identical by those used by other applicants applying for other positions?

23. If not, please furnish a copy of all the different types of applications used.

24. Does the Company require that every applicant attach a copy of their birth certificate to the application regardless of the type of position applied for?

25. Is there a question or questions in every and all applications directing the applicant to furnish information regarding their national origin?

26. If so, what is the purpose for this requirement?

27. Is it the policy of the Company to deny employment to all those Applicants not born in the United States of America?

28. If so, have there ever been any exceptions to this policy?

29. In the event of an affirmative response to Interrogatory No. 28, state the name, address, company position, and nationality of such person or persons.

30. Is it the policy of the Company to deny employment to naturalized citizens of the United States of America?

31. Is the fact that an applicant is not born in the United States of America an automatic bar to employment with the Company?

32. Are there ever made any inquiries as to whether the foreign born applicant is a legal resident of the United States of America?

33. State the names and addresses of all persons that have been denied employment on the basis that they were not born in the United States of America since the Company started operations.

34. Does the Company provide for on-the-job training for any of its employees?

Respectfully submitted,

/s/ Ruben Montemayor

RUBEN MONTEMAYOR

Attorney for Petitioners

1414 Tower Life Building

San Antonio, Texas 78205

512 224-5471

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed March 8, 1971]

**ORDER ENLARGING TIME TO FILE OBJECTIONS
AND TO ANSWER INTERROGATORIES**

This cause this day came on to be heard, upon the Motion of the Defendant, for an enlargement of time in which to file objections to interrogatories propounded to Defendant under Rule 33 of the Rules of Civil Procedure and for an enlargement of time in which to answer interrogatories to which there may be no objection. And, for good cause shown, and by agreement of the parties, it is, therefore,

ORDERED and ADJUDGED, that the Defendant be, and it is thereby granted until March 29, 1971, in which to file objections to such interrogatories and in which to file answers to interrogatories to which there may be no objections made.

ORDERED and ADJUDGED, this 8th day of March, 1971.

/s/ D W Suttle

Judge

AGREED:

KEMP, SMITH, WHITE,
DUNCAN & HAMMOND
1500 First National Building
El Paso, Texas 79901

By /s/ William Duncan

William Duncan,
Attorneys for Defendant

/s/ Ruben Montemayor

Ruben Montemayor,
Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

[TITLE OMITTED]

[Filed March 29, 1971]

**DEFENDANT'S OBJECTIONS TO
INTERROGATORIES**

Comes now Defendant in the above entitled and numbered cause and makes the following objections to the written interrogatories served herein by Plaintiff on the 19th day of February, 1971.

I.

Objection to Interrogatory No. 10, which interrogatory is as follows:

What are the names, addresses of the persons with the Company who either have or had duties connected with the attraction, screening or hiring of job applicants?

The objection is that the interrogatory is not reasonably limited in scope of time. Plaintiff alleges that she was discriminated against on the basis of national origin when she was refused employment by Defendant on July 19, 1969. Defendant has contemporaneously herewith filed an answer to the above interrogatory listing individuals now with the Company who have since January 1, 1969, performed duties connected with the attraction, screening or hiring of job applicants. The listing of individuals per-

forming similar duties prior to January 1, 1969, would be so remote in time as to be irrelevant. Defendant has answered the interrogatory using the date January 1, 1969, because Plaintiff in Interrogatories No. 13, 14 and 15, uses that same date in requesting information.

II.

Objection to Interrogatory No. 15, which interrogatory is as follows:

With respect to each person interviewed for employment by the Company for the position of Sewing Machine Operator at any time since January 1, 1969:

- a. What are the names, national origins, dates of application of each person?
- b. For each person listed in response to (a) above, which person from the Company conducted the interviews?
- c. If during the application—interview process any oral or written examination was given to those persons described in (a) above, what type and form of test was given and what was the result for each applicant?
- d. What educational or previous work experience or health qualifications were made known to the Company about each of these applicants?
- e. What disposition was made by the Company of each application?

- f. What were the specific reasons for either hiring or not hiring each applicant?

The general objection to the overall inquiry of Interrogatory No. 15 is that since January 1, 1969, it can be conservatively estimated that the Company has interviewed well in excess of ten thousand applicants for the position of Sewing Machine Operator. To review that number of applications would be unduly burdensome and costly for Defendant. Furthermore, and even more importantly, most of the information requested in the subsections to Interrogatory No. 15 is not contained in the job applications. Defendant makes the following specific objections to each subsection of Interrogatory No. 15.

(1) Interrogatory No. 15 (a) inquires about names, national origin and dates of application of each job applicant. The job application form does not reveal the applicant's national origin. To review the several thousand applications for names and dates would be unduly burdensome and costly and it would not materially aid in the resolution of any issue in the captioned case.

(2) Interrogatory No. 15 (b) asks the identity of the person from the Company who conducted the interview. This information is not on the application form. The person conducting the interview could be identified, if at all, only by his handwriting.

(3) Interrogatory No. 15 (c) asks about oral or written examinations given to job applicants. None are given.

(4) Interrogatory No. 15 (d) inquires as to educational, previous work experience, or health qualifications. Although the job applications would reflect this information, such information is completely irrelevant to Plaintiff's suit which is founded on alleged discrimination by Defendant on the basis of national origin. Defendant does not hire persons who are not citizens of the United States, regardless of education, previous work experience, or health qualifications. Furthermore, to obtain the requested information would require a review of several thousand job applications, a task unduly burdensome.

(5) Interrogatory No. 15 (e) asks the disposition of each application. Since several thousand applications are involved, determining the disposition of each would be unduly burdensome, especially since the application itself does not reveal the requested information.

(6) Interrogatory No. 15 (f) inquires about the specific reasons for hiring or not hiring each applicant. This information is not available, with the partial exception that a refusal to hire based solely on non-United States citizenship could sometimes be determined from the application form. However, since Farah admits that it refuses to hire non-citizens, an examination of several thousand applications would provide no additional relevant information.

III.

Objection to Interrogatory No. 17, which interrogatory is as follows:

What are the starting wages for the position of Sewing Machine Operator?

Rule 26(b)(1), Federal Rules of Civil Procedure, requires that the matter inquired into in any discovery proceeding be "relevant to the subject matter involved in the pending action." The objection is that the information sought by Interrogatory No. 17 is wholly irrelevant to whether Defendant discriminated against Plaintiff in refusing to hire her because she is not a United States citizen.

IV.

Objection to Interrogatory No. 18, which interrogatory is as follows:

For an employee performing satisfactorily, what are the promotional opportunities and wage increases offered by the Company over a period of one year or more?

Rule 26(b)(1), Federal Rules of Civil Procedure, requires that the matter inquired into in any discovery proceeding be "relevant to the subject matter involved in the pending action." The objection is that the information sought by Interrogatory No. 18 is wholly irrelevant to whether Defendant discriminated against Plaintiff in refusing to hire her because she is not a United States citizen.

WHEREFORE, PREMISES CONSIDERED, Defendant moves this Court for an order quashing Interrogatories No. 15, (in part), 17 and 18, and excusing it from answering them and requests that Defendant, in its answer

to Interrogatory No. 10, be required to provide information only from January 1, 1969, to the present.

DATED March 29, 1971.

KENNETH R. CARR

P. O. Box 9519

El Paso, Texas 79985

Thomas H. Sharp, Jr.

GROCE, HEBDON, FAHEY &
SMITH

911 Frost Bank Building

San Antonio, Texas 78205

KEMP, SMITH, WHITE,

DUNCAN & HAMMOND

1500 First National Building

El Paso, Texas 79901

By /s/ William Duncan

WILLIAM DUNCAN

Attorneys for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed March 29, 1971]

**DEFENDANT'S ANSWERS TO PLAINTIFF'S
FIRST SET OF INTERROGATORIES**

PEDRO P. VILLAVERDE, Secretary of Defendant, FARAH MANUFACTURING COMPANY, INC., having been duly sworn, makes the following answers to written interrogatories propounded to Defendant by Plaintiff in the above entitled case.

Answer to Interrogatory No. 1: P. O. Box 9519, (8889 Gateway West), El Paso, Texas 79985.

Answer to Interrogatory No. 2: 1000 Frio City Road, San Antonio, Texas.

Answer to Interrogatory No. 3: Manufacture of men's and boys' slacks and jeans.

Answer to Interrogatory No. 4: Yes.

Answer to Interrogatory No. 5: Yes.

Answer to Interrogatory No. 6:

William F. Farah	President	8889 Gateway West El Paso, Texas
William J. Conroy	Executive Vice President	8889 Gateway West El Paso, Texas

Thomas A. Prendergast	Vice President	8889 Gateway West El Paso, Texas
Gordon W. Foster	Vice President	8889 Gateway West El Paso, Texas
A. Abihider	Vice President	8889 Gateway West El Paso, Texas
William R. Landa	Vice President	8889 Gateway West El Paso, Texas
Joe Chemali, Jr.	Vice President	8889 Gateway West El Paso, Texas
James P. Viola	Vice President	8889 Gateway West El Paso, Texas
Oscar Fatuch	Vice President	8889 Gateway West El Paso, Texas
Pedro P. Villaverde, Jr.	Secretary	8889 Gateway West El Paso, Texas

Answer to Interrogatory No. 7: None

Answer to Interrogatory No. 8: Manufacture of men's and boys slacks and jeans.

Answer to Interrogatory No. 9: Yes.

Answer to Interrogatory No. 10: Farah has filed contemporaneously an objection to the breadth of Interrogatory No. 10 insofar as it inquires into individuals performing the designated functions prior to January 1, 1969. The following individuals have performed the functions designated in Interrogatory No. 10 since January 1, 1969:

<u>Name</u>	<u>Location</u>
Ernesto Alvarez	8889 Gateway West El Paso, Texas
Al Barcena	8889 Gateway West El Paso, Texas
Ofelia Bigford	204 Profit Drive Victoria, Texas
John J. Blevins, Jr.	5474 East Paisano El Paso, Texas
Don Chaffee	8889 Gateway West El Paso, Texas
Joe Chemali, Jr.	8889 Gateway West El Paso, Texas
Victor Chemali	8889 Gateway West El Paso, Texas
Pauline Diaz	1000 Frio City Road San Antonio, Texas
Frank Dickerson	1000 Frio City Road San Antonio, Texas
Robert R. Dominguez	5474 East Paisano El Paso, Texas
Pablo Dow	1000 Frio City Road San Antonio, Texas
Gabriel A. Ekery	5474 East Paisano El Paso, Texas
Norman Ekery	8889 Gateway West El Paso, Texas
Jimmy Flack	2220 South Main Las Cruces, New Mexico
Joe Flores	8889 Gateway West El Paso, Texas
Erich A. Goeldner	8889 Gateway West El Paso, Texas

Ernest F. Goeldner	8889 Gateway West El Paso, Texas
Pete Gonzales	8889 Gateway West El Paso, Texas
Alfonso Govea	5474 East Paisano El Paso, Texas
Juanita Gutierrez	1000 Frio City Road San Antonio, Texas
William L. Isaac	1500 East Third Street El Paso, Texas
Isidro E. Luna	1500 East Third Street El Paso, Texas
Robert Maldonado	8889 Gateway West El Paso, Texas
Daniel Mansour	1000 Frio City Road San Antonio, Texas
Manuel O. Martinez	5474 East Paisano El Paso, Texas
James F. Murphy	1500 East Third Street El Paso, Texas
John Rendon	204 Profit Drive Victoria, Texas
Estella Rodela	1000 Frio City Road San Antonio, Texas
Orlando A. Segura	5474 East Paisano El Paso, Texas
Joe Serna	8889 Gateway West El Paso, Texas
Henry Sosa	8889 Gateway West El Paso, Texas
Darrell Swinson	1000 Frio City Road San Antonio, Texas
Robert Taylor	204 Profit Drive Victoria, Texas

Mary Helen Vela	1000 Frio City Road
	San Antonio, Texas
Richard S. Zubiate	1500 East Third Street
	El Paso, Texas

Answer to Interrogatory No. 11:

Ernesto Alvarez	Interviews and Screens
Al Barcena	Hires
Ofelia Bigford	Interviews
John J. Blevins, Jr.	Interviews
Don Chaffee	Screens and Hires
Joe Chemali, Jr.	Hires
Victor Chemali	Screens and Hires
Pauline Diaz	Interviews
Frank Dickerson	Interviews
Robert R. Dominguez	Interviews
Pablo Dow	Hires
Gabriel A. Ekery	Screens and Hires
Norman Ekery	Screens and Hires
Jimmy Flack	Hires
Joe Flores	Screens
Erich A. Goeldner	Screens and Hires
Ernest F. Goeldner	Screens and Hires
Pete Gonzales	Screens
Alfonso Govea	Interviews
Juanita Gutierrez	Interviews
William L. Isaac	Hires
Isidro E. Luna	Interviews
Robert Maldonado	Interviews
Daniel Mansour	Interviews
Manuel O. Martinez	Interviews and Screens
James F. Murphy	Screens
John Rendon	Interviews

Estella Rodela
 Orlando A. Segura
 Joe Serna
 Henry Sosa
 Darrell Swinson
 Robert Taylor
 Mary Helen Vela
 Richard S. Zubiate

Interviews
 Screens and Hires
 Screens and Hires
 Screens and Hires
 Screens and Hires
 Hires
 Interviews
 Interviews, Screens and Hires

Answer to Interrogatory No. 12: None.

Answer to Interrogatory No. 13: Not applicable.

Answer to Interrogatory No. 14: None

Answer to Interrogatory No. 15: Farah has contemporaneously herewith filed an objection to Interrogatory No. 15, but it volunteers answers in part to the following subsections of that interrogatory:

(1) Interrogatory No. 15(a): Job application forms used by Defendant do not reveal the applicant's national origin.

(2) Interrogatory No. 15(b): The identity of the person from the Company conducting the employment interview is not revealed on the application form, and could be determined, if at all, only by handwriting.

(3) Interrogatory No. 15(c): No written or oral examinations are given to job applicants for Sewing Machine Operator.

(4) Interrogatory No. 15(d): An objection has been filed contemporaneously herewith.

(5) Interrogatory No. 15(e): An objection has been filed contemporaneously herewith.

(6) Interrogatory No. 15(f): Only if the refusal to hire was based solely on the applicant's not being a U. S. citizen might the reason for not hiring appear on the job application.

Answer to Interrogatory No. 16: Assembly of various cut pieces of fabric and items of trim, such as thread, buttons, etc., into final garment.

Answer to Interrogatory No. 17: Farah has contemporaneously herewith filed an objection.

Answer to Interrogatory No. 18: Farah has contemporaneously herewith filed an objection.

Answer to Interrogatory No. 19: Yes.

Answer to Interrogatory No. 20: Attached.

Answer to Interrogatory No. 21: She was refused employment because she is not a citizen of the United States.

Answer to Interrogatory No. 22: No.

Answer to Interrogatory No. 23: Copy of Office Application attached.

Answer to Interrogatory No. 24: No, but the Company does require proof of U. S. citizenship.

Answer to Interrogatory No. 25: There is no inquiry on any job application form or in any interview concerning the applicant's national origin.

Answer to Interrogatory No. 26: Not applicable.

Answer to Interrogatory No. 27: No.

Answer to Interrogatory No. 28: Not applicable.

Answer to Interrogatory No. 29: Not applicable.

Answer to Interrogatory No. 30: No.

Answer to Interrogatory No. 31: No.

Answer to Interrogatory No. 32: No.

Answer to Interrogatory No. 33: There are none.

Answer to Interrogatory No. 34: Yes

DATED this 25th day of March, 1971.

/s/ Pedro P. Villaverde, Jr.

PEDRO P. VILLAVARDE, JR.,

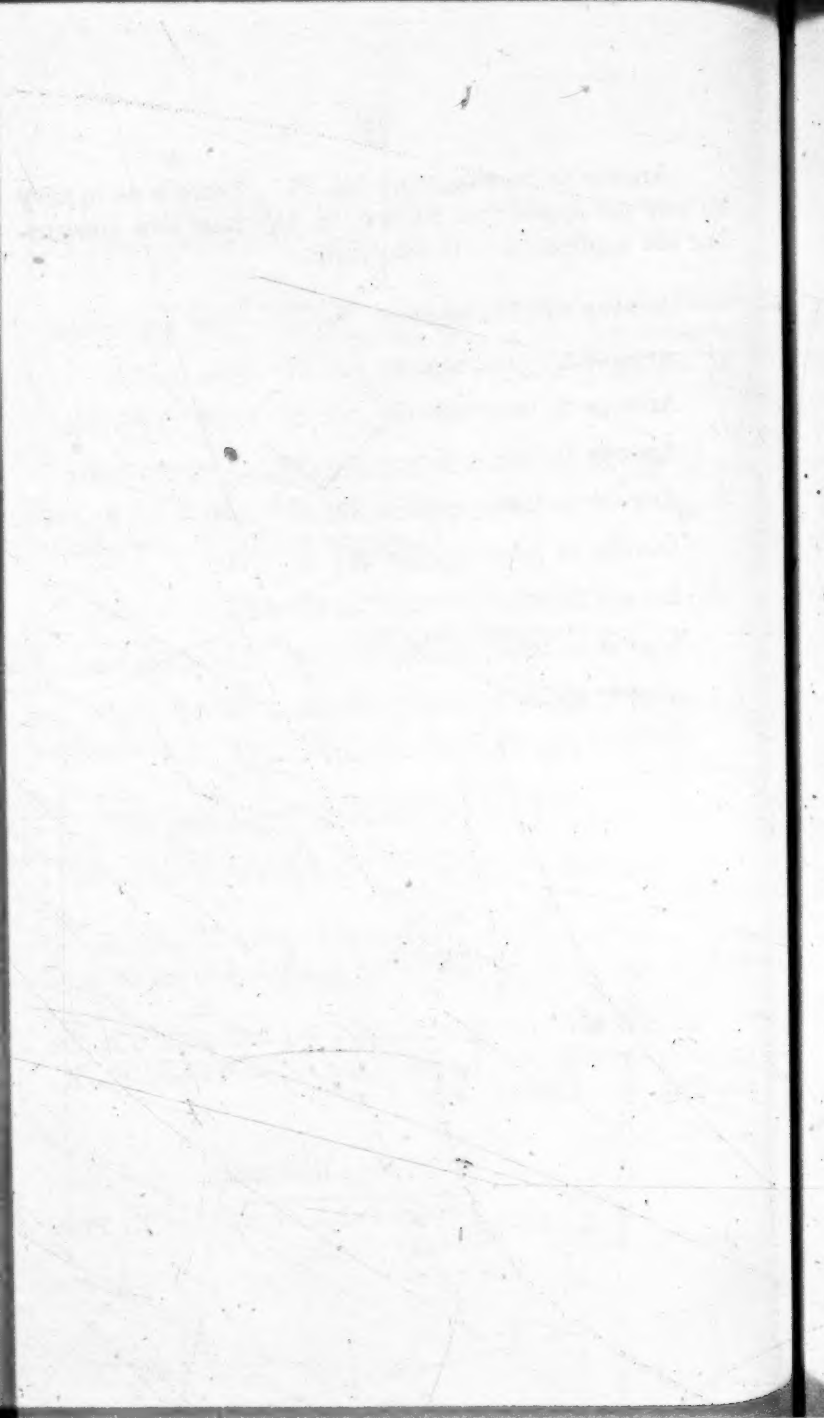
Secretary

FARAH MANUFACTURING
COMPANY, INC., Defendant

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, by PEDRO P. VILLAVARDE, JR., this 25th day of March, 1971.

/s/ Sharon E. Fries

Notary Public in and for El Paso
County, Texas



EMPLOYMENT APPLICATION

Date July 19, 1969Name Cecilia M. EspinozaAddress 612 W. Mitchell S.S. # 459-02-1038Marital Status: M S D Sep. Draft Status —Father, Husband, Wife Rudy B. EspinozaChildren 1 Care Mother

Previous Employment

Type

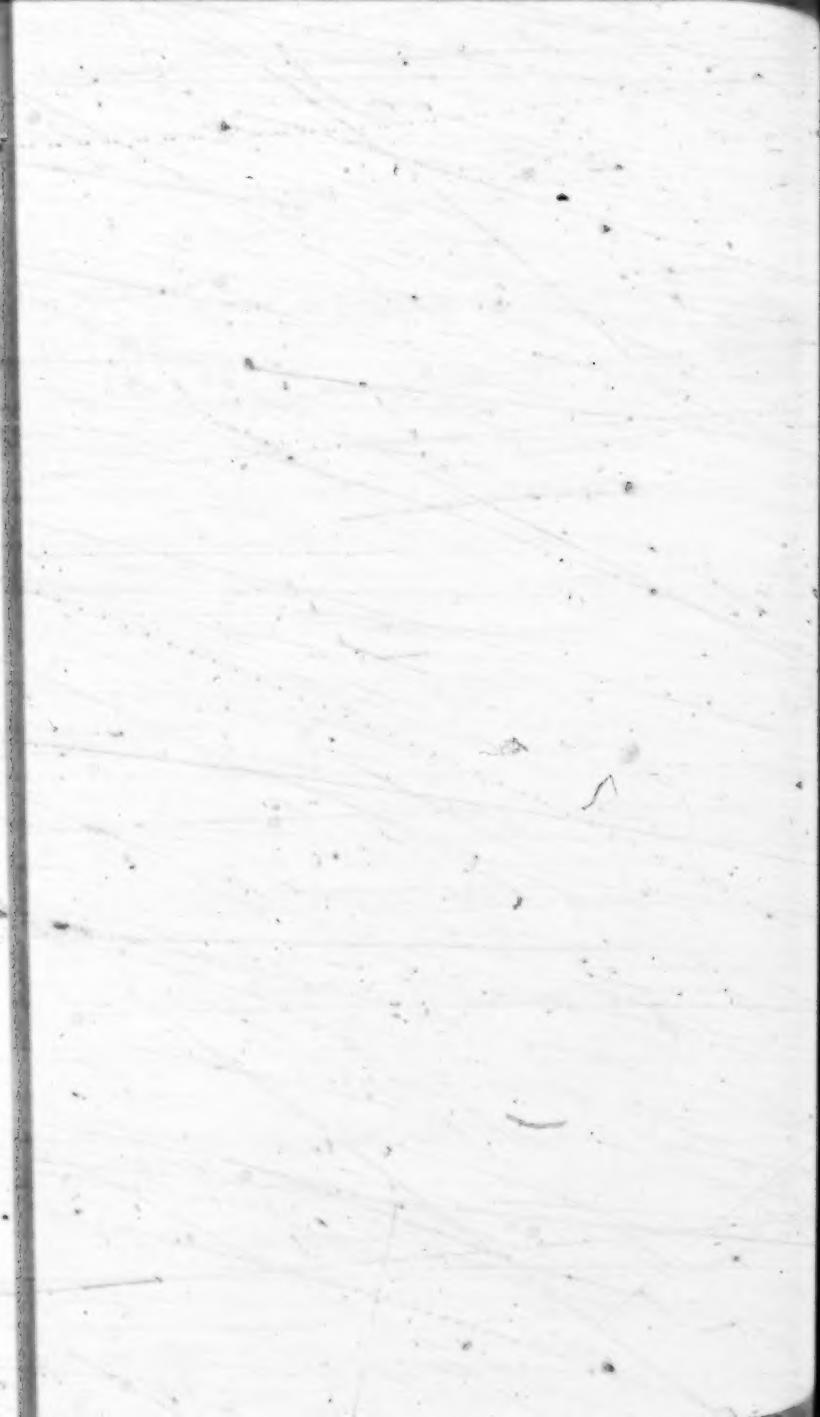
From

To

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Brother & Sister Scorio Montez - 1Friends Linda EspinozaRelatives Mother - Paula RochaEducation —Job Suited For OpenHealth Good

Remarks: _____



68

47

Date _____

Married Single Divorced Children _____ Care _____

Husband or Father _____

From To Pay Rate

Saturday Work _____

Office Machines _____

Health _____

Education _____

Physical _____
Disposition _____



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed May 10, 1971]

**DEFENDANT'S AMENDED ANSWER TO
PLAINTIFF'S FIRST SET OF INTERROGATORIES**

PEDRO P. VILLAYERDE, JR., Secretary of Defendant, FARAH MANUFACTURING COMPANY, INC., having been duly sworn, makes the following Amended Answer to written Interrogatories propounded to Defendant by Plaintiff in the above entitled case.

Although not bearing on any answer to specific interrogatories propounded to Defendant, the following information is supplied. As a result of negotiations subsequent to the execution of Defendant's Answers to Plaintiff's First Set of Interrogatories, Farah Manufacturing Company, Inc. will acquire Tex Manufacturing Company, a manufacturer of men's and boys' jeans and slacks, and Tex Management Company, on June 15, 1971. It is Farah's intention to retain all of the approximately 600 employees of Tex Manufacturing Company, with the exception of two or three management personnel.

Tex Manufacturing Company employs non-citizens of the United States. Although the exact number is unknown, the best estimate is that approximately 300 are non-citizens. Therefore, effective June 15, 1971, Farah will have in its employ approximately 300 non-citizens.

Farah does not, however, intend to hire any additional non-citizens, and it is contemplated that natural attrition will steadily deplete the number of non-citizens employed at the present Tex facility. In all respects other than that set forth in this Amended Answer, Farah's hiring policy will remain the same.

Dated this 6th day of May 1971.

/s/ Pedro P. Villaverde, Jr.,

Pedro P. Villaverde, Jr.

Secretary

**FARAH MANUFACTURING
COMPANY, INC.,**

Defendant

[Jurat Omitted]

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

[TITLE OMITTED]

[Filed June 21, 1971]

**ORDER ENLARGING TIME IN WHICH TO FILE
SUMMARY JUDGMENT & BRIEF**

This cause this day came on to be heard, upon the Motion of the Plaintiffs for an enlargement of time in which to file Summary Judgment and Brief to which there may be no objections made, and for good cause shown, it is, therefore,

ORDERED and ADJUDGED, that the Plaintiff be, and it is thereby granted until July 15, 1971, in which to file Summary Judgment and Brief.

ORDERED and ADJUDGED, this 21st day of June, 1971.

/s/ D. W. Suttle

JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed June 29, 1971]

MOTION FOR SUMMARY JUDGMENT

Comes now Petitioner, CECILIA ESPINOZA, and moves the Court, pursuant to Rule 56 of the Rules of Civil Procedure, to enter judgment for Petitioner in that there is no genuine issue as to any material fact in the action and that Petitioner is entitled to a judgment as a matter of law. As appears from the pleadings, and the affidavits attached hereto and made a part hereof, it is uncontradicted that Respondent, in refusing to hire Petitioner because she is not a United States citizen, thereby discriminating on the basis of national origin, and is in violation of Title VII of

the Civil Rights Act of 1964, 42 USC §2000 e-2, the Fifth Amendment and the equal protection clause.

Petitioner requests oral argument.

SIGNED on this the 29th day of June, A.D., 1971.

/s/ Ruben Montemayor

RUBEN MONTEMAYOR
Attorney for Petitioner
1414 Tower Life Building
San Antonio, Texas 78205
512 224-5471

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed September 21, 1971]

MEMORANDUM OF DECISION

[The decision of the District Court may be found at
pp. 10a-15a of the Petition for Writ of Certiorari.]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed September 21, 1971]

PARTIAL JUDGMENT

The Court, having considered the files and records of this case, and in accordance with the Memorandum of Decision on file herein, enters the following judgment:

It is ORDERED, ADJUDGED and DECREED that the defendant FARAH MANUFACTURING COMPANY, INC., on or about July 19, 1969, in refusing to hire plaintiff CECILIA ESPINOZA because she was not a citizen of the United States, intentionally engaged in an unlawful employment practice under 42 U.S.C. §2000e-2(a)(1), and that defendant FARAH MANUFACTURING COMPANY, INC., be, and it is, hereby, permanently enjoined, pursuant to 42 U.S.C. §2000e-5(g), from engaging in such unlawful employment practice.

Entered this 21st day of September, 1971.

/s/ D. W. Suttle

United States District Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

[TITLE OMITTED]

[Filed October 18, 1971]

NOTICE OF APPEAL

Notice is hereby given that FARAH MANUFACTURING COMPANY, INC, Defendant, appeals to the United States Court of Appeals for the Fifth Circuit from the Partial Judgment entered in this action on the 21st day of September, 1971.

Dated: October 11, 1971.

**Kenneth R. Carr
P. O. Box 9519
El Paso, Texas 79985**

**Thomas H. Sharp, Jr.
Groce, Hebdon, Fahey & Smith
911 Frost Bank Building
San Antonio, Texas 78205**

**KEMP, SMITH, WHITE,
DUNCAN & HAMMOND
1500 First National Building
El Paso Texas 79901**

By /s/ William Duncan

**WILLIAM DUNCAN
Attorneys for Defendant**

[Certificate of Service Omitted]

**OPINIONS OF THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

[The opinions of the Court of Appeals may be found
at pp. 1a-9a of the Petition for Writ of Certiorari.]

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

[TITLE OMITTED]

Filed: November 25, 1970

ORAL DEPOSITION OF CECILIA ESPINOZA

APPEARANCES:

LAW OFFICE OF RUBEN MONTEMAYOR

By RUBEN MONTEMAYOR, Esquire,

Appearing for Petitioners;

KEMP, SMITH, WHITE, DUNCAN & HAMMOND

By JACK RATLIFF, Esquire,

Appearing for Respondent;

RAYMOND L. RAMIREZ,

Appearing for Equal Employment Opportunity
Commission;

RUDOLFO ESPINOZA;

HENRY CASTILLO,

The Interpreter;

CECILIA ESPINOZA,
The Witness, and

LYNN MILLHOLLON,
Notary Public and Court Reporter.

DEPOSITION upon oral examination, of the witness, CECILIA ESPINOZA, taken by the Respondent in the above entitled cause, wherein Cecilia Espinoza, Et Vir, are the Petitioners, and Farah Manufacturing Co. is the Respondent, [2] pending in the United States District Court, for the Western District of Texas, San Antonio Division, before LYNN MILLHOLLON, a Notary Public in and for Bexar County, Texas, on the 12th day of November, A. D., 1970, at the La Quinta Motel, 333 NE Loop 410, San Antonio, Bexar County, Texas, between the hours of 2:00 o'clock p.m. and 3:05 o'clock p.m., pursuant to the following agreement of counsel:

It is stipulated and agreed by and between counsel and the respective parties hereto, that the deposition of the witness named in the caption hereto, may be taken at this time and place, and that the said deposition, or any part thereof, when so taken may be used on the trial of this cause the same as if the witness were present in Court and testifying in person.

It is further stipulated and agreed by and between counsel and the respective parties hereto, that the necessity for preserving objections to the questions propounded or to the answers given, whether said objections go to the substance or the form of the questions or the answers, at the time of the taking of the deposition or any time thereafter, whether orally or in writing, is waived and that any and

all objections to this deposition, or any part thereof, may be made and urged for the first time at the time same is sought to be offered in evidence on the trial of this cause.

[3] It is further stipulated and agreed by and between counsel and the respective parties hereto, that the signature of the witness hereto is waived.

* * *

HENRY CASTILLO, the Interpreter, being first duly cautioned and sworn to translate the questions from English into Spanish, and the answers from Spanish into English, to the best of his ability, did so as follows:

CECILIA ESPINOZA,

a witness of lawful age, being first duly cautioned and sworn through the Interpreter, to tell the truth, the whole truth and nothing but the truth, testified on her oath, through the Interpreter, as follows:

DIRECT EXAMINATION

Questions by Mr. Ratliff:

MR. RATLIFF:

Let's go on the record, then, and stipulate that this deposition is taken after waiver by both parties of the necessity for notice, commission, or any other formalities for the taking of the deposition; and that the deposition may be used fully as if all formalities have been observed. Defendant waives the necessity for signature of the deposition.

Q (By Mr. Ratliff) State your full name for the record, please.

[4] A Cecilia Espinoza.

Q And your age?

A 22 years.

Q Where were you born?

A In Zaragoza, Coahuila, Mexico.

Q I understand that you do not speak English.

A No, I don't understand it.

Q When did you first enter the United States?

A The first time was about three years ago.

Q Did you enter the United States before or after you married your husband, Mr. Espinoza?

A Before.

Q And when were you married?

A March 1st, 1968.

Q Where were you married?

A Here in the United States.

Q Was that in San Antonio?

A Yes, sir.

Q How many children do you have?

A I only have one little girl.

Q And how old is she?

A She will be two years old on January 31st.

Q How old is your husband?

A My husband is 31 years.

Q Where is he employed?

[5] A TSO, Texas State Optical.

Q What does he do there?

A He repairs the frames for the glasses.

Q Has your husband ever worked for the Farah Company?

A No, sir.

Q Are you now employed?

A No, sir.

Q Have you been employed since you entered the United States?

A No, sir. I have not worked.

Q Have you made an application for employment since coming to the United States other than the application to Farah which is the subject of this case?

A No.

Q That's the only job application you have made since you came into the United States?

A Yes, sir.

Q Mr. Espinoza, you understand that you are now giving your deposition?

A Yes, sir.

Q And you understand that this is given under oath, just as if you were in the Court on the witness stand testifying?

A Yes, sir.

Q I want you to be sure and stop and ask me to clarify [6] anything that I ask you that you don't fully understand.

A All right.

Q Would you do that?

A Yes, sir.

Q What is the extent of your schooling or education?

A I went to primary only.

Q And where was that?

A In Mexico.

Q Where in Mexico?

A Zaragoza, Coahuila, Mexico.

Q And primary means how many grades of school?

A In Mexico, the primary means only six years of schooling.

Q So you have completed six years of grammar school?

A Yes, sir.

Q Is your husband a United States citizen?

A Yes, sir.

Q How did he obtain his citizenship, by birth or naturalization?

A Birth.

Q And I believe you said you were born in Mexico?

A Yes, sir.

Q Have you considered applying for United States citizenship?

A Yes, sir, because I'm going to live here. My husband lives here.

[7] MR. RATLIFF:

Do you want to go off the record a minute?

(A discussion was had off the record.)

Q To be sure you understand me, do you now intend to apply for citizenship in the United States to be a citizen?

A Yes, sir.

Q Have you taken any steps to become a citizen?

A Yes, sir.

Q And what have you done?

A I was in school, but only remained two months.

Q And when was that?

A That was in the year 1968.

Q Have you done anything else toward becoming a United States citizen?

A No, sir.

Q Do you know how long it takes you to become a citizen?

A Yes, sir.

Q And how long is that?

A I think it's four or five years.

Q Do you know what you have to do in order to become a United States citizen?

A Yes, sir.

Q And as soon as you are able to, do you intend to become a citizen, if that's possible?

[8] A Yes, sir.

Q As far as you know, is there anything which will keep you from becoming a citizen?

A Not up to the present time, except I don't know how to speak English.

Q Do you intend to learn how to speak English?

A Yes, sir.

Q I believe you said your husband speaks English?

A Yes, sir.

Q And is he helping you to learn English?

A A little.

Q And is he helping you with the steps to become a citizen?

A I believe so.

Q When did you first have anything to do with Farah Manufacturing Company insofar as looking for a job is concerned?

A It was in June of '69.

Q Did you apply for a job at Farah?

A Yes, sir.

Q And where did you do that?

A At the plant.

Q Was that at an employment office at the plant?

A Yes.

Q Did you complete some written forms for application?

A Yes. I filled out the application.

[9] Q All right. What else did you do in connection with applying for the job?

A I filed my application, and eight days later I went back to check.

Q And what did you find out?

A I talked to the young lady. She saw my application and told me—she said that I could not be employed because I was not an American citizen.

Q And do you know the name of the lady who talked to you at that time?

A No, sir.

Q All right. What did you do then?

A I told her that my husband was a citizen of the

United States, that I was residing here, that my husband was residing here, and that I had a little girl.

Q And then what happened?

A She said it was a company regulation.

Q All right. Did you have any other conversation with her or anyone else from Farah Manufacturing?

A Not with her, no. I called my husband and I told him I had not been employed because I was not an American citizen, and my husband called back.

Q He called to Farah, is that right?

A Yes, and he talked to the young lady with whom I had spoken, and she told him the same thing.

[10] Q All right. Then what happened?

A My husband told her that he thought it was discrimination and that he was going to do something about it, and he filed a complaint with the lawyers that are in charge of discrimination.

Q Did he at that time file the complaint with the EEOC, or did he first contact Mr. Montemayor?

A He filed the complaint with the EEOC.

MR. MONTEMAYOR:

May I interrupt a little bit?

MR. RATLIFF:

Do you want to go off the record?

(A discussion was had off the record.)

MR. RATLIFF:

Back on the record.

Q Did you or did your husband or did both of you talk to the people at the EEOC about this situation?

A Both of us spoke to them.

Q And what did they do, if anything, about your complaint?

A I first talked to a gentleman, and then I understand he was going to withdraw from it or resign, and then another gentleman went to my house, and he was going to follow up on the complaint.

MR. RATLIFF:

Off the record just a minute.

(A discussion was had off the record.)

[11] Q Do you know the name of the man who said he was going to follow up on the complaint?

A I think it's Mr. Villarreal.

Q And did he handle your claims from then on?

A Yes.

Q Did you appear at any hearing of any kind or give any sworn testimony in connection with his investigation?

A No.

Q You didn't attend any deposition or give any sworn testimony such as you are giving here today?

A Well, Mr. Villarreal asked me some questions.

Q And these were just personal questions that he asked you in interviewing you, is that correct?

A Yes, sir.

Q Well, you were not involved in any administrative proceeding or hearing involving a presentation to the Commissioner or involving sworn testimony before the EEOC?

A No, sir.

MR. MONTEMAYOR:

She did make an affidavit.

MR. RATLIFF:

She did make an affidavit?

MR. MONTEMAYOR:

Yes.

Q Since those initials are kind of a mouthful for both of us, Mrs. Espinoza, I will refer to the EEOC from now [12] on as the Commission.

A All right.

Q Mrs. Espinoza, you need not answer this if you don't know the answer. As I understand it, you are not claiming that you were denied employment because of your Mexican ancestry?

A No, sir.

Q In other words, it is generally recognized, is it not, here in San Antonio that the Farah Company hires a large number of Mexican American citizens in its business?

A Yes, sir.

Q Your complaint is that you have been discriminated against because of citizenship only, is that correct?

A Yes, sir.

Q What is your present classification with regard to citizenship? Are you a resident alien?

A Yes, sir.

Q And as a resident alien, aren't you required to fill out certain forms or register at certain times?

A Yes, sir.

Q How often do you register?

A Every year.

Q And where do you do that?

A You get little cards which you fill out and send them.

[13] Q Aren't you also required to notify the same authorities of any change of address or change of city?

A Yes, sir.

Q Have you ever applied for employment with the United States Federal Government?

A No, sir.

Q Are you aware that the United States Government does not employ persons other than United States citizens?

A No, sir.

Q Are you aware of anyone else in your circumstances at present who is either a party to this suit or who intends to become a party to this suit?

A I know that girl that also went, and I believe they told her the same thing.

Q So far as you know, she is not represented to Mr. Montemayor at this time?

A No, sir.

Q As I understand you, you have never held a job other than as wife and mother since you have been in the United States?

A Yes, sir.

Q And what job was that? Are you saying you have not held a job in the United States?

A I have not had any employment here.

Q Now, your little girl was born when?

[14] A. January 31st.

Q In what year?

A '69.

Q What did you plan to do about your baby if you had obtained employment?

A My mother was going to take care of her.

Q At the employment office, were you given any other reason for denial of employment other than your not having United States citizenship?

A No, sir. That was the only reason.

Q Have you ever held a job for pay in Mexico?

A Yes, sir. I worked in a store.

Q Where was that and what kind of a store was it?

A In Zaragoza, Coahuila, Mexico, in a grocery store.

Q Have you ever worked anywhere else for pay?

A Not here.

Q Or in Mexico?

A No, sir. That was the only place, at that store.

Q How long did you work there?

A About eight months.

Q What did you do?

A I was a clerk.

Q How much were you paid?

A I was earning ten pesos a day, ten Mexican pesos a day.

Q What particular job did you apply for at Farah?

[15] A As a seamstress.

Q Do you have any experience as a seamstress?

A No, sir.

Q As I understand it, the application at Farah was the only application for employment you have made since you came to the United States?

A Yes, sir.

Q Do you know the date on which you say you were denied employment because of your non-citizenship?

A I don't know the exact date, but it was in June.

MR. MONTEMAYOR:

Jack, do you want to know the date?

MR. RATLIFF:

Yes. I would like to have it.

MR. MONTEMAYOR:

July 19th, 1969.

MR. RATLIFF:

That was the date of the denial, not the application.

MR. MONTEMAYOR:

Oh, yes. Let's see. This is what appears in the charge of discrimination, a copy of which I have. It's July 19th, 1969. Is that correct? Well, she applied for employment for a machine operator, and it was responded to on July 19th, 1969. Now, the following month, August 11th, filing of the charge, and then — I don't have any date that —

MR. RATLIFF:

Well, off the record just [16] a minute.

(A discussion was had off the record.)

MR. RATLIFF:

Let's go back on the record.

Q (By Mr. Ratliff) Mrs. Espinoza, your attorney has supplied some information I'm going to give you and ask you, so far as you know, if that is correct —

A All right.

Q — that you signed an affidavit and charge of discrimination on August 9th, 1969?

A Yes.

Q That the complaint or charge of discrimination was filed with the Commission on August 11th, 1969?

A Yes, sir.

Q That's on August 11th, 1969?

A Yes, sir.

Q That the discrimination which is complained of here allegedly took place on July 19th, 1969?

A Yes.

MR. MONTEMAYOR:

She's got it there in this letter. Would you show it to the attorney? Off the record.

(A discussion was had off the record.)

(Respondent's Exhibit No. 1 was thereupon marked for identification by the [17] Reporter.)

Q (By Mr. Ratliff) All right. Mrs. Espinoza, we have marked the copy of the letter which you handed me as Respondent's Exhibit No. 1, and I want to ask you if that's a copy of a letter which your husband wrote to the Commission?

A Yes.

Q And are the facts that he has stated in there true, to the best of your knowledge?

A Yes, sir.

MR. RATLIFF:

We can translate that for you if you would like. Why don't you read her the translation, if you will?

(The Interpreter thereupon read the referred to instrument.)

MR. MONTEMAYOR:

It doesn't mention anything about legal residence, but it doesn't make any difference.

Q Okay. Now that this Respondent's Exhibit No. 1 has been translated, Mrs. Espinoza, do you believe that the information in that letter is correct?

A Yes, sir.

Q I understand that your sister-in-law is employed by Farah, is that right?

A She was.

[18] Q And when did she terminate her employment with them?

A I don't know exactly when.

Q Do you know under what circumstances she left Farah?

A I believe that she was not able to work and at the same time take care of her house.

Q Do you know who was hired for the job for which you were applying?

A No, sir.

Q Do you understand that those were persons who were Mexican Americans with Mexican ancestry, but who are United States citizens?

A Yes, sir.

Q I may have asked you this, but what is your street address in San Antonio?

A 1229 Pleasanton.

Q In your complaint in this case, your attorney has alleged that you have been damaged in the sum of \$3,968.00 because of the denial of employment. Do you know how that figure was computed?

A No, sir.

MR. RATLIFF:

Off the record just a minute.

(A discussion was had off the record.)

MR. RATLIFF:

Back on the record.

Q (By Mr. Ratliff) For the record, I understand from [19] counsel that the sum represents the amount of earnings from the time of denial of employment up to the time of the filing of the complaint.

A Yes.

Q On August 18th, apparently you were sent a certified notice from the Commission which told you of a right to sue within 30 days?

A Yes, sir.

Q Do you recall receiving that notice? I'll show you a copy of it.

A I think I have it here. (Indicating)

Q All right. You are showing me a copy of a certified letter that you received signed by Mr. Lee Williams. Do you know on what day you received that letter?

A Not exactly.

Q Well, if the record showed that it was mailed to you from a San Antonio address on the 18th, is it reasonable to assume that you received that on the 19th of August, 1970?

A Yes, sir.

Q So as far as you know now, you received that on the 19th of August, is that right?

A Yes, sir.

MR. RATLIFF:

Do you have any objection if I mark and attach this?

[20] MR. MONTEMAYOR:

Go ahead.

(Respondent's Exhibit No. 2 was thereupon marked for identification by the Reporter.)

Q Now, do you have any other papers in your personal possession, Mrs. Espinoza, which relate to this case?

A No, sir.

Q The letter you have there is not related to this?

A Oh, yes. I think this is the last one.

Q May I see that one, too?

A (Indicating)

MR. RATLIFF:

Do you mind if I mark this, too?

MR. MONTEMAYOR:

No. I don't even know what it is.

MR. RATLIFF:

It's just the background. Off the record.

(A discussion was had off the record.)

(Respondent's Exhibit No. 3 was thereupon marked for identification by the Reporter.)

Q All right. We have marked that as Respondent's Exhibit No. 3, and I will ask you, Mrs. Espinoza, if Respondent's Exhibit No. 3 is a letter which you received apparently from the Commission?

[21] A Yes, sir.

Q All right. Now, do you have any other letters or copies of letters or any other thing in writing that has anything to do with this case in your personal possession?

A No, sir. That's all.

Q Have you or your husband ever been the Plaintiff or Defendant in a lawsuit before?

A No, sir.

Q Have either of you ever filed a claim of discrimination under any law?

A No, sir.

Q How long has your husband worked for TSO?

A I think it's been two years.

MR. RATLIFF:

Pass the witness.

MR. MONTEMAYOR:

No questions.

MR. RATLIFF:

Thank you very much, Mrs. Espinoza.

(Signature waived.)

[22]

STATE OF TEXAS :

:

COUNTY OF BEXAR :

I, LYNN MILLHOLLON, a Notary Public duly commissioned and qualified in and for the County of Bexar, State of Texas, do hereby certify that there came before me on the 12th day of November, A. D., 1970, at 2:00 o'clock p.m., at the La Quinta Motel, 333 NE Loop 410, San Antonio, Bexar County, Texas, the following named person, to-wit: CECILIA ESPINOZA, who was by me duly sworn, through the Interpreter, to testify to the truth and nothing but the truth of her knowledge touching and concerning the matters in controversy in this cause; that she was thereupon carefully examined upon her oath, through the Interpreter, and her examination reduced to typewriting under my supervision; that the deposition is a true record of the testimony given by the witness; and that the signature of the witness hereto is waived.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set [23]
my hand and affixed my Notarial seal on this the 19th
day of November, A.D., 1970.

s/ Lynn Millhollon

LYNN MILLHOLLON
Notary Public in and for
Bexar County, Texas.

My Commission expires the 1st day of June, A.D., 1971.

24

Respondents Ex. #1
the
1/12/70

Mr. Rudolfo Espinoza
 612 W. Mitchell
 San Antonio, Texas 78204

Equal Opportunity Federal Bldg.
 Room G-115 Federal Bldg.
 Austin, Texas 78701

Dear Sirs:

I am writing you in regards to certain events that took place, Sat. July 19, 1969. This particular day, My wife (Mrs. Cecilia Espinoza) applied for a position with the Farah Mfg. Co., 1000 Frio City Rd., San Antonio, Texas. While she was there, they gave her an application to fill out. On completing the application, they advised her that they would notify her by mail.

A week elapsed and not hearing from them, my wife took it upon herself to contact the personal office. While there, they pulled her application out and informed her that she could not be employed thereas "she was not an American citizen", having been born in Mexico. She contested this by stating that she was married to an American citizen, who was born in San Antonio, Sept. 17, 1939. They ignored her and she was forced to leave.

I have taken it upon myself to ask your department for possible help in this matter, as I called the personal office myself and they gave me the same reason. Rather than make an issue with them, I am placing this matter in your hands and at the same time, thanking you for your anticipated cooperation in this matter.

Sincerely,

Rudolfo Espinoza

RE:lp



25
 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
 REGIONAL OFFICE
 300 E. 8th STREET
 AUSTIN, TEXAS 78701

AREA CODE 512
 478-6611

August 18, 1970

CERTIFIED NO. 4379319
 RETURN RECEIPT
 REQUESTED

CASE YAU 196
 CHARGE YAU 0096
 RESPONDENT, Farah Mfg. Co.

Respondent's (B) 11/12/70

Mrs. Cecilia Espinosa
 1229 Pleasanton Road, Apt. 2
 San Antonio, Texas 78214

Dear Mrs. Espinosa:

Enclosed is your NOTICE OF RIGHT TO SUE WITHIN THIRTY DAYS which you requested. Also enclosed is a copy of your charge and a pre-addressed post card. Should you decide to sue, please have the attorney complete and mail the card as soon as possible.

I regret that the Commission has been unable to obtain voluntary compliance with Title VII of the Civil Rights Act of 1964.

Please let my office know if you have any questions.

Sincerely,

Lee G. Williams
 Lee G. Williams
 Regional Director

Copies to:

☒ Espinosa - Regular Mail

Farah Manufacturing Co.
 1000 Frio City Road
 San Antonio, Texas 78207

Farah Mfg. Co.
 8869 Gateway West
 El Paso, Tx. 79925

Fulbright, Crocker, Freeman, Bates & Javorski,
 Attorneys, 900 Travis, Houston, Texas

Bill to be mailed "certified"



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
REGIONAL OFFICE
300 E. 8TH STREET
AUSTIN, TEXAS 78701

Area Code 512
479-5611

July 23, 1970

Re: Espinoza v. Parah Mfg. Co., Inc.
Case No. YAOO-196

Respondent's Ex. 13
(Enc)
11/13/71

Mrs. Cecilia Espinoza
1229 Pleasanton Road, Apt. 2
San Antonio, Texas

Dear Mrs. Espinoza:

We regret to inform you that our efforts to resolve your case on a pre-decision basis have failed. The company's position is that they will not settle with or without a decision and that they are prepared to go to the Supreme Court if necessary.

Under our new procedures, we will have our Decisions and Interpretations Division prepare or draft a decision in the case.

You may at any time, however, request your "notice-of-right-to-sue." You will then have thirty (30) days in which to file suit in Federal District Court against the Respondent in this case.

We regret that we were unable to settle your case at this level. If you have any questions or if we may assist you in any way, please let us know.

Sincerely,

Das Gonzales
Das Gonzales
Chief of Conciliations
Austin Regional Office

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

[TITLE OMITTED]

[Filed Feb. 19, 1971]

STIPULATION

It is stipulated by the undersigned that the attached papers constitute the entire file relating to the captioned cause compiled by the Equal Employment Opportunity Commission, and that each entry in the said file shall be qualified in all respects as if it had been properly authenticated as a business or government record, and fully as if the appropriate government employee had identified and authenticated its contents.*

KEMP, SMITH, WHITE,
DUNCAN & HAMMOND
1500 First National Building
El Paso, Texas 79901

By: s/ William Duncan

WILLIAM DUNCAN,
Attorneys for Defendant
Farah Manufacturing
Company, Inc.

s/ Ruben Montemayor,

RUBEN MONTEMAYOR,
Attorney for Plaintiffs

*In the interest of authenticity and accuracy, the following documents have been photostatically reproduced to preserve the handwriting and marks on them even though this resulted in a small type face for certain of the printed material.

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TITLE PAGE

CONTROL CARD DATA

Date of Initial Contact with C.P.: 2/4/70
 Date of 10-day Letter: 2/17/70
 SIC Code: _____ #EE'S: 625

CHARGING PARTIES:

1 CHARGE NO.: TAU 0-0096
 NAME: Mrs. Odette Espinoza
 ADDRESS: 115 Baseball
San Antonio, Texas
 PHONE: 1433-7768

2 CHARGE NO.: TAU
 NAME:
 ADDRESS:
 PHONE: 1 -

3 CHARGE NO.: TAU
 NAME:
 ADDRESS:
 PHONE: 1 -

4 CHARGE NO.: TAU
 NAME:
 ADDRESS:
 PHONE: 1 -

RESPONDENTS:

1 NAME: Farah Mfg. Co.
 ADDRESS: 1002 Fair City Rd.
San Antonio, Texas 78207
 PHONE: 1 -

PARENT'S
 NAME: Farah Mfg. Co.
 ADDRESS: 8818 Gateway Blvd.
EL Paso, Texas 79925
 PHONE: 915 1281-4444

ATTORNEY OF
 RECORD:
 ADDRESS:
 PHONE: 1 -

2 SECOND
 RESPONDENT:
 ADDRESS:
 PHONE: 1 -

PARENT'S NAME:
 ADDRESS:
 PHONE: 1 -

ATTORNEY OF
 RECORD:
 ADDRESS:
 PHONE: 1 -

SUMMARY OF CHARGES

BASIS	CHARGE	RECOMMENDATION
<i>Political Origin - SIA</i>	<i>Failure to hire - Not an American Citizen</i>	<i>Concise</i>

PERSONS CONTACTEDCHARGING PARTY'S WITNESSES:

1 NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

2 NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

2 NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

RESPONDENT'S WITNESSES:

NAME: *Mr. William French*
 ADDRESS: *1917 Culbuck Rd*
El Paso, Texas 79905
 PHONE: *915 659-4444*
 TITLE: *President*

NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

OTHERS:

NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

NAME: _____
 ADDRESS: _____
 PHONE: / - _____
 TITLE: _____

PERSONS CONTACTED, CONTINUEDCHARGING PARTY'S WITNESSES:RESPONDENT'S WITNESSES:OTHERS:

NAME:
ADDRESS:
PHONE: / -
TITLE:

NAME:
ADDRESS:
PHONE: / -
TITLE:

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PHONE: / -
TITLE:

DATES

Date of Alleged Violation:	<u>7-19-69</u>
Filing Date:	<u>1-9-69</u>
Date Assigned to Investigator:	<u>1-26-70</u>
Date of Service of Charge:	<u>2-12-70</u>
Date Draft Report Completed:	<u>2-27-70</u>
Date Report Typed:	<u>- -</u>

NAME OF INVESTIGATOR: Raymond Pittcock , AUSTIN

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JURISDICTIONAL ITEMS

Sworn Charge and Receipt for Service
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 Correspondence Received:
 Telegram Received:

BA

CHARGING PARTY'S STATEMENTS

Affidavits and Interviews
 Correspondence

B-1
B-2

* STATEMENTS BY WITNESSES FOR CHARGING PARTY

BC-

STATEMENTS BY WITNESSES FOR RESPONDENT

Interview with Mr. William French - President

BD-

RESPONDENT'S STATEMENT OF POSITION: Copy of 1067 letter dated 2/19/70
 letter from Respondent's Attorney dated 2/16/70
 Reply of Respondent

BE

No copy of Parent letter - Charge served to President

* RECORDS: From the Charging Party

BF

*RECORDS: From the Respondent

OF

*OTHER WITNESSES

OG

TOUR OF FACILITIES *Tour of facilities was conducted at site.*

OH

KEO REPORTS *About 90 % of work force is SSA*

OI

COMMUNITY BACKGROUND DATA *About 50% of population is SSA.*

OJ

*UNION CONTRACT

OK

*OTHER ITEMS

OL

*IRRELEVANT MATERIAL

OM

*Indicates TAB Letters Which Are Not Used.

REGIONAL DIRECTOR'S FINDINGS OF FACTS

Mrs. Rudolfo Espinoza
Charging Party

TAUO-0096

vs

Farah Manufacturing Company
San Antonio, Texas
Respondent

Date of alleged violation: July 19, 1969
Date of filing of charge: August 11, 1969
Date of service of charge: February 12, 1970

1. Charging Party alleges that Respondent Employer has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire her because of her national origin (Spanish Surnamed American, non-USA citizen). Respondent denies the charge.
2. Respondent's San Antonio plant employs 625 persons, of whom 95 percent are Spanish Surnamed Americans and 1.2 percent are Negroes.
3. Respondent, an industry affecting commerce, engages in the manufacture of clothing.
4. Charging Party, a Spanish Surnamed American female, is not a citizen of the U.S.A. ^{although} she is married to ^{one,} a Spanish-Surnamed American, a citizen of the U.S.A., San Antonio, Texas.
5. Charging Party states that she applied for employment as a machine operator with Respondent on July 19, 1969. Charging Party states that the reason given to her for not hiring her was that she is not a citizen of the U.S.A.
6. Respondent's president and the attorney of record state that Respondent has historically and consistently enforced an "unwritten" company policy to hire only persons who are citizens of the U.S.A. These officials give no reason for the existence of this policy.
7. Respondent's president states that there has been only one exception to this policy, however, he refused to furnish the investigator with the name of such employee.

Espinoza vs Parah Manufacturing Company, TAUO-0096

Page

I 8. Respondent's employee distribution report shows that 95 percent of its employees are Spanish Surnamed Americans. Eighteen out of the twenty-two employees classified as "skilled and above" are Spanish Surnamed Americans.

B 9. Charging Party states in her affidavit that she believes that the persons hired instead of her, were Spanish Surnamed Americans and citizens of the U.S.A.

B 10. Charging Party's sister-in-law, ^{SPANISH SURNAMED} a U.S.A. citizen, is employed by Respondent.

11. I find that the issue in this case is "citizenship" and not national origin.

12. I find no evidence in the record which indicates that Respondent did not hire Charging Party because of her national origin.

11. I find that Respondent Employer's hiring practices are discriminatory against non-citizens of the U.S.A., and that it did not hire Charging Party because she is a non-citizen of the U.S.

FEDERAL REGISTER

VOLUME 35

NUMBER 8

Tuesday, January 13, 1970

Washington, D.C.



Page 421

Title 28—USCA

Chapter XIV—Equal Employment Opportunity Commission

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF RACE OR NATIONAL ORIGIN

By virtue of the authority vested in it by section 7171 of the Act to U.S.C., section 2805a-10(a), the Commission hereby issues Title 28, Chapter XIV, § 1606.1 in the Code of the Federal Regulations.

Because the provisions of the Administrative Procedure Act (5 U.S.C. 551) require notice of proposed rule-making opportunity for public participation, and since the Commission rules are susceptible to those interpretative rules, the guidance of its proposed administrative procedure and shall be applicable with respect to charges pending before, or hereafter filed with the Commission.

§ 1606.1 Guidelines on Discrimination Because of Race or National Origin

(a) The Commission is aware of the widespread problem of discrimination on the basis of racial origin, and it intends to apply the full force of law to eliminate such discrimination. The burden of eliminating such discrimination as it pertains to national origin cases shall be borne by employers, and the Commission shall be required to take such action as may be necessary to enforce the law.

(b) Title VII is intended to eliminate racial as well as the color, ancestry of discrimination, and the Commission has, therefore, issued a rule, particularly concerning cases where persons within the jurisdiction of the Commission have been denied equal employment opportunities for reasons which are based on national origin and ancestry. The scope of cases of this category which come to the attention of the Commission includes the use of race in the hiring process, where the individual is denied employment because of his race or national origin, and where the individual is denied employment because of his race or national origin. The use of race in the hiring process is not limited to the hiring process, but it also includes the hiring process that is not a requirement of the work to be performed, and of such opportunity to receive training, to be promoted, and to be transferred to other positions within the organization. The Commission is aware of the fact that discrimination on the basis of race or national origin is a widespread problem, and it intends to apply the full force of law to eliminate such discrimination. The burden of eliminating such discrimination as it pertains to national origin cases shall be borne by employers, and the Commission shall be required to take such action as may be necessary to enforce the law.

(c) The Commission is aware of the fact that discrimination on the basis of race or national origin is a widespread problem, and it intends to apply the full force of law to eliminate such discrimination. The burden of eliminating such discrimination as it pertains to national origin cases shall be borne by employers, and the Commission shall be required to take such action as may be necessary to enforce the law.

(d) In addition, some States have enacted laws which are the equivalent of Title VII, and the Commission is aware of the fact that such laws are in effect in such States, and it intends to apply the full force of law to eliminate such discrimination. The burden of eliminating such discrimination as it pertains to national origin cases shall be borne by employers, and the Commission shall be required to take such action as may be necessary to enforce the law.

(e) This rule is effective upon publication.

Signed at Washington, D.C., this 10th day of January 1970.

James M. Bevel, Jr., Chairman.

John H. Garvey, Jr., Vice Chairman.

John H. Garvey, Jr., Vice Chairman.



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 ANNUAL EMPLOYMENT OPPORTUNITY COMMISSION
 REGIONAL OFFICE
 300 E. 9th STREET
 AUSTIN, TEXAS 78701

Area Code 512
 478-0211

REGIONAL DIRECTOR'S FINDINGS OF FACTS

Cecilia (Rudolfo) Espinoza
 Charging Party

Charge No. TAUO-0096

vs.

Farsh Manufacturing Co., Inc.
 San Antonio, Texas
 Respondent

Date of alleged violation: July 19, 1969
 Date of filing of charge: August 11, 1969
 Date of service of charge: February 12, 1970

1. Charging Party alleges that Respondent Employer has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire her because of her national origin (Spanish Surnamed American - not a United States citizen). Respondent denies the charge.
2. Respondent's San Antonio plant employs about 625 persons, of whom ninety-five percent are Spanish Surnamed Americans.
3. Respondent engages in the manufacturing of clothing, an industry affecting commerce.
4. Charging Party, a Spanish Surnamed female, is not a citizen of the United States, although she is married to a citizen and is a resident of San Antonio, Texas.
5. Charging Party states that on July 19, 1969, she applied for employment by Respondent as a machine operator; Charging Party states that she was not hired, and that the reason given was that she is not a citizen of the United States.

Forah Manufacturing Co., Inc.

Page 2

6. Respondent's president and the attorney of record stated that Respondent has historically and consistently enforced an "unwritten" company policy to hire only persons who are citizens of the United States. These officials give no reason for the existence of this policy.

7. Respondent's president stated that there has been one exception to this policy, but has

8. Respondent's president refused to furnish the investigator with the name of such employee.

9. Charging Party's sister-in-law, a Spanish Surnamed United States citizen, is employed by Respondent.

10. I find no evidence in the record, which indicates that Respondent did not hire Charging Party because she is Spanish Surnamed.

11. However, Charging Party states that she believes that the persons hired instead of her were Spanish Surnamed but citizens of the United States.

12. I find that Respondent Employer rejects persons who are not United States citizens, and that there is no valid business reason for such rejection. I find that it did not hire Charging Party because she is not a citizen of the United States.

13. To be submitted
by August 10
surprise this

Date

Lee G. Williams
Regional Director
Austin Regional Office

13. There is no evidence in the record that the Respondent's policy of employing only citizens of the United States is related to the interests of national security.

Farah Manufacturing Co., Inc.

Page 2

6. The Respondent's president and its attorney of record stated that the Respondent has historically enforced an unwritten company policy to hire only persons who are citizens of the United States. These officials gave no reason for the existence of this policy.
7. The Respondent's president stated that there has been one exception to this policy, but he, the Respondent's president, refused to furnish the investigator with the name of such employee.
8. The Charging Party's sister-in-law, a Spanish Surnamed United States citizen, is employed by Respondent.
9. The Charging Party stated that she believed that the persons hired instead of her were Spanish Surnamed citizens of the United States.
10. The evidence in the record does not establish that Respondent refused to employ Charging Party because she is Spanish Surnamed.
11. The Respondent Employer rejects these applicants for employment who are not United States citizens.
12. The Respondent refused to employ the Charging Party because she is not a citizen of the United States.
13. There is no evidence in the record that the Respondent's policy of employing only citizens of the United States is related to the interests of national security.

Date _____

Lee G. Williams
Regional Director
Austin Regional Office

REGIONAL DIRECTOR'S FINDING OF FACT

Cecelia (Rudolfo) Espinoza
Charging Party

Case No. YAUO-196

vs.

Farah Manufacturing Co., Inc.
San Antonio, Texas
Respondent

Date of alleged violation:
Date of filing of charge:
Date of service of charge:

July 19, 1969
August 11, 1969
February 12, 1970

1. The Charging Party alleges that the Respondent employer has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire her because of her national origin (Spanish Surnamed--not a United States citizen). The Respondent denies the charge.
2. The Respondent's San Antonio plant employs about 625 persons, of whom ninety-five percent are Spanish Surnamed Americans.
3. The Respondent engages in the manufacturing of clothing, an industry affecting commerce.
4. The Charging Party, a Spanish Surnamed female, states that she is not a citizen of the United States, although she is married to a citizen and is a resident of San Antonio, Texas.
5. The Charging Party states that on July 19, 1969, she applied for employment by the Respondent as a machine operator; that she was not hired, and that the reason given her was that she is not a citizen of the United States.

Farah Manufacturing Co., Inc.
Case No. YAUO-196

Page 2

6. The Respondent's president and its attorney of record stated that the Respondent has historically enforced an unwritten company policy to hire only persons who are citizens of the United States. These officials gave no reason for the existence of this policy.
7. The Respondent's president stated that there has been one exception to this policy, but he refused to furnish the investigator with the name of such employee.
8. The Charging Party's sister-in-law, a Spanish Surnamed United States citizen, is employed by Respondent.
9. The Charging Party stated that she believed that the persons hired instead of her were Spanish Surnamed citizens of the United States.
10. The evidence in the record does not establish that Respondent refused to employ Charging Party because she is Spanish Surnamed.
11. The Respondent Employer rejects those applicants for employment who are not United States citizens.
12. The Respondent refused to employ the Charging Party because she is not a citizen of the United States.
13. There is no evidence in the record that the Respondent's policy of employing only citizens of the United States is related to the interests of national security.

Date _____

Lee G. Williams
Regional Director
Austin Regional Office

FEDERAL REGISTER

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NUMBER 2

Tuesday, January 13, 1970

Washington, D.C.



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Title 28—L2203

Chapter 157—Equal Employment
Opportunity Commission

PART 1600—GUIDELINES ON DIS- CRIMINATION BECAUSE OF NA- TIONAL ORIGIN

By virtue of the authority vested in it by section 11201 of the Act, 42 U.S.C. section 1980a-11(a), the Commission hereby issues Title 28, Chapter XIV, §1600 in the Code of the Federal Regulations.

Because the provisions of the Administrative Procedure Act (50 U.S.C. 1001) regarding notice of proposed rule making, opportunity for public participation, and delay in effective date, are inapplicable to these interpretative rules, the guidelines shall become effective immediately and shall be applicable with respect to charges presented before or thereafter filed with the Commission.

§ 1600.1 Guidelines on discrimination because of national origin.

(a) The Commission is aware of the widespread practice of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The hereby issued occupational qualification exception as it pertains to national origin cases shall be strictly construed.

(b) Title VII is intended to eliminate discrimination on the basis of national origin, and the Commission will therefore, wherever possible, particularly in areas where public action, the jurisdiction of the Commission has been denied, equal employment opportunity for persons which are grounded in national origin considerations. Examples of such of this character which have come to the attention of the Commission include: The use of race in the English language where the individual being hired came from circumstances of the English language where the individual being hired was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a particular national origin; denial of equal opportunity because of membership in particular organizations devoted with or without to promote the interests of national origin; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a particular national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin; and denial of equal opportunity to persons whose names are placed and to fall outside national names for length and weight where such height and weight specifications are not necessary for the performance of the work involved.

(c) Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizen, domiciled or residing in the United States against discrimination on the basis of race, color, religion, sex, or national origin.

(d) Because discrimination on the basis of national origin is the effect of discrimination on the basis of race, color, or religion, Title VII is intended to eliminate such discrimination wherever possible. Examples of such of this character which have come to the attention of the Commission include: The use of race in the English language where the individual being hired came from circumstances of the English language where the individual being hired was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a particular national origin; denial of equal opportunity because of membership in particular organizations devoted with or without to promote the interests of national origin; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a particular national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin; and denial of equal opportunity to persons whose names are placed and to fall outside national names for length and weight where such height and weight specifications are not necessary for the performance of the work involved.

(e) In addition, if the Commission has conducted investigations and found evidence of discrimination, Title VII is intended to eliminate such discrimination wherever possible. Examples of such of this character which have come to the attention of the Commission include: The use of race in the English language where the individual being hired came from circumstances of the English language where the individual being hired was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a particular national origin; denial of equal opportunity because of membership in particular organizations devoted with or without to promote the interests of national origin; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a particular national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin; and denial of equal opportunity to persons whose names are placed and to fall outside national names for length and weight where such height and weight specifications are not necessary for the performance of the work involved.

(f) Title VII, 42 U.S.C. 1980a-11(a), 1980a-11(b), 1980a-11(c), 1980a-11(d), 1980a-11(e), 1980a-11(f), 1980a-11(g), 1980a-11(h), 1980a-11(i), 1980a-11(j), 1980a-11(k), 1980a-11(l), 1980a-11(m), 1980a-11(n), 1980a-11(o), 1980a-11(p), 1980a-11(q), 1980a-11(r), 1980a-11(s), 1980a-11(t), 1980a-11(u), 1980a-11(v), 1980a-11(w), 1980a-11(x), 1980a-11(y), 1980a-11(z), 1980a-11(aa), 1980a-11(ab), 1980a-11(ac), 1980a-11(ad), 1980a-11(ae), 1980a-11(af), 1980a-11(ag), 1980a-11(ah), 1980a-11(ai), 1980a-11(aj), 1980a-11(ak), 1980a-11(al), 1980a-11(am), 1980a-11(an), 1980a-11(ao), 1980a-11(ap), 1980a-11(aq), 1980a-11(ar), 1980a-11(as), 1980a-11(at), 1980a-11(au), 1980a-11(av), 1980a-11(aw), 1980a-11(ax), 1980a-11(ay), 1980a-11(az), 1980a-11(ba), 1980a-11(bb), 1980a-11(bc), 1980a-11(bd), 1980a-11(be), 1980a-11(bf), 1980a-11(bg), 1980a-11(bh), 1980a-11(bi), 1980a-11(bj), 1980a-11(bk), 1980a-11(bl), 1980a-11(bm), 1980a-11(bn), 1980a-11(bo), 1980a-11(bp), 1980a-11(bq), 1980a-11(br), 1980a-11(bs), 1980a-11(bt), 1980a-11(bu), 1980a-11(bv), 1980a-11(bw), 1980a-11(bx), 1980a-11(by), 1980a-11(bz), 1980a-11(ca), 1980a-11(cb), 1980a-11(cc), 1980a-11(cd), 1980a-11(ce), 1980a-11(cf), 1980a-11(cg), 1980a-11(ch), 1980a-11(ci), 1980a-11(cj), 1980a-11(ck), 1980a-11(cl), 1980a-11(cm), 1980a-11(cn), 1980a-11(co), 1980a-11(cp), 1980a-11(cq), 1980a-11(cr), 1980a-11(cs), 1980a-11(ct), 1980a-11(cu), 1980a-11(cv), 1980a-11(cw), 1980a-11(cx), 1980a-11(cy), 1980a-11(cz), 1980a-11(da), 1980a-11(db), 1980a-11(dc), 1980a-11(dd), 1980a-11(de), 1980a-11(df), 1980a-11(dg), 1980a-11(dh), 1980a-11(di), 1980a-11(dj), 1980a-11(dk), 1980a-11(dl), 1980a-11(dm), 1980a-11(dn), 1980a-11(do), 1980a-11(dp), 1980a-11(dq), 1980a-11(dr), 1980a-11(ds), 1980a-11(dt), 1980a-11(du), 1980a-11(dv), 1980a-11(dw), 1980a-11(dx), 1980a-11(dy), 1980a-11(dz), 1980a-11(ea), 1980a-11(eb), 1980a-11(ec), 1980a-11(ed), 1980a-11(ee), 1980a-11(ef), 1980a-11(eg), 1980a-11(eh), 1980a-11(ei), 1980a-11(ej), 1980a-11(ek), 1980a-11(el), 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 "AL EMPLOYMENT OPPORTUNITY C"
 REGIONAL OFFICE
 200 E. 9TH STREET
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REGIONAL DIRECTOR'S FINDING OF FACT

 Cecelia (Rudolfo) Espinoza
 Charging Party

Case No. YA00-196

vs.

 Farah Manufacturing Co., Inc.
 San Antonio, Texas
 Respondent

 Date of alleged violation:
 Date of filing of charge:
 Date of service of charge:

 July 19, 1969
 August 11, 1969
 February 12, 1970

1. The Charging Party alleges that the Respondent employer has engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964 by refusing to hire her because of her national origin (Spanish Surnamed--not a United States citizen). The Respondent denies the charge.
2. The Respondent's San Antonio plant employs about 625 persons, of whom ninety-five percent are Spanish Surnamed Americans.
3. The Respondent engages in the manufacturing of clothing, an industry affecting commerce.
4. The Charging Party, a Spanish Surnamed female, states that she is not a citizen of the United States, although she is married to a citizen and is a resident of San Antonio, Texas.
5. The Charging Party states that on July 19, 1969, she applied for employment by the Respondent as a machine operator; that she was not hired, and that the reason given her was that she is not a citizen of the United States.

Farah Manufacturing Co., Inc.
Case No. YAUC-196

Page 2

6. The Respondent's president and its attorney of record stated that the Respondent has historically enforced an unwritten company policy to hire only persons who are citizens of the United States. These officials gave no reason for the existence of this policy.
7. The Respondent's president stated that there has been one exception to this policy, but he refused to furnish the investigator with the name of such employee.
8. The Charging Party's sister-in-law, a Spanish Surnamed United States citizen, is employed by Respondent.
9. The Charging Party stated that she believed that the persons hired instead of her were Spanish Surnamed citizens of the United States.
10. The evidence in the record does not establish that Respondent refused to employ Charging Party because she is Spanish Surnamed.
11. The Respondent Employer rejects those applicants for employment who are not United States citizens.
12. The Respondent refused to employ the Charging Party because she is not a citizen of the United States.
13. There is no evidence in the record that the Respondent's policy of employing only citizens of the United States is related to the interests of national security.

Date _____

Lee G. Williams
Regional Director
Austin Regional Office

TITLE 29 - LABOR

Chapter XIV - Equal Employment
Opportunity CommissionPart 1601 - Procedural
RegulationsProcedure Following Filing of Charge**§ 1601.19a Field Director's findings of fact.**

Upon completion of an investigation, the Field Director will cause to be prepared and served upon the parties his findings of fact in the case, which shall contain findings of fact and the evidence upon which such findings are based.

§ 1601.19b Exceptions to Field Director's findings of fact.

(a) Within fifteen (15) days, or within such further period as the Field Director may allow, from the date of service of the Field Director's findings of fact, the parties may file such exceptions to the Field Director's findings of fact, objections, briefs and evidence in support thereof as they desire. When requested by a person not represented by counsel, assistance in the preparation of exceptions to the Field Director's findings of fact will be provided by personnel of the Field Office as deemed practicable by the Field Director.

(b) Each exception shall:

(1) Set forth the specific procedure, finding, policy, or interpretation of law or fact to which objection is taken;

(2) Identify any and all parts of the Field Director's findings of fact to which exception is taken by reference to the precise page and paragraph of the determination;

(3) State the grounds for the exception, including the citation to any authority relied upon, and a description of any factual circumstance or interpretation of facts upon which reliance is placed.

(c) Any exception to findings which is not specifically urged may be deemed waived. Any exception which fails to comply with the requirements set forth in paragraph (b) of this section may be disregarded.

(d) Within five (5) days from the date of this filing of exceptions, or within such further period as the Field Director allows, cross exceptions may be filed in the manner set forth in paragraph (b) of this section.

(e) All such exceptions and cross exceptions shall be accompanied by proof of service on all parties. The Field Director may perfect service as deemed practicable.

FEDERAL EMPLOYMENT COMMISSION
REGIONAL OFFICE
DEOR. DIVISION
AUSTIN, TEXAS 78701

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED

CERTIFIED-RETURN RECEIPT
1356467

May 6, 1970

CASE NO. YAUO-196
CHARGE NO. YAUO-0096
Espinosa vs Farah Hfg. Co.

Mrs. Cecelia Espinosa
115 Rosebell Drive
San Antonio, Tx. 78201

Dear Mrs. Espinosa:

I am writing you about your charge of employment discrimination which is identified on our records as is shown in the upper right hand corner of this page.

On the basis of the information or evidence furnished us during our investigation, I have made Findings of Fact in my capacity as Regional Director (Field Director). These findings summarize the relevant evidence on which they are based and a copy of them is enclosed.

If you disagree with any of the findings or any statement made in them, you have the right to object in writing, using the enclosed postage-free envelope in making your reply. Your right to file such objections or exceptions to the Findings of Fact is described fully in the copy of the Commission Regulations (Sections 1601.19a and 1601.19b) which is enclosed.

If there is anything about this letter, the Findings of Fact or the Commission Regulations which you do not understand, or if you need any help, please telephone the office 512/475-5811 and we will try to help you.

If you do not call us or write us within fifteen (15) days from the time you receive this letter, we shall conclude that you have no objections to the findings.

Please remember that if you want help, you should telephone us collect, and that if you want to file written objections or exceptions or supply additional evidence, you must do so within 15 days from the day you receive this letter.

Very sincerely yours,

Lee G. Williams
Regional Director

Enclosures



EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION
REGIONAL OFFICE
300 E. RIM STREET
AUSTIN, TEXAS 78701
May 8, 1970

Area Code 512
475-5311

CERTIFIED-RETURN RECEIPT

CASE No. YAUO-196
CHARGE No. YAUO-0096
Espinoza v. Farah Mfg. Co.

Farah Manufacturing Co., Inc.
1000 Frio City Road
San Antonio, Tx. 78207

Dear Sirs:

We have investigated the charge of employment discrimination identified above. On the basis of the information or evidence furnished us during our investigation, I have made Findings of Fact in my capacity as Regional Director (Field Director). These findings summarize the relevant evidence on which they are based and a copy of them is enclosed.

If you disagree with any of the findings or statements of evidence, or if you believe that other relevant evidence has not been considered, you may file exceptions. A copy of pertinent parts of the Commission's regulations is enclosed. A postage-free addressed envelope is also enclosed for your convenience.

Exceptions; If you wish to file any, must be filed in duplicate and I must receive them within fifteen days after your receipt of this letter.

If you desire other evidence to be considered, that evidence, in duplicate, must be submitted with the exceptions. You will note that the regulations require that your exceptions must be accompanied by proof of service on all parties.

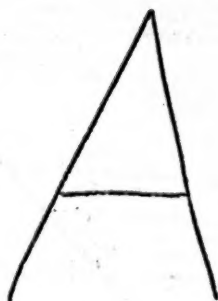
Should you desire further information or assistance in the preparation of the exceptions, please call or write me.

Very sincerely yours,

Lee G. Williams
Regional Director

Enclosures

cc: Farah Mfg. Co., El Paso, Tx.
cc: Fulbright, Crocker, Freeman, Bates & Jaworski,
Attorneys, 200 Travis, Houston, Tx.



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CHARGE OF DISCRIMINATION

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

(PLEASE PRINT OR TYPE)

1 Your Name (Mr., Mrs., Miss) Rudolfo EspinozaStreet Address 612 W. MitchellCity San AntonioState TexasPhone Number 924 4531Zip Code 78204

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☒ Sex ☐

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Ench Hfg. Co.Street address 1000 Frio City Rd.City San AntonioState TexasZip Code 78207

AND (other parties if any)

H. O. H. F.

4 Have you filed this charge with a state or local government agency? Yes ☐ When MONTH DAY YEAR No ☒5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☒6 The most recent date on which this discrimination took place: Month July Day 19 Year 1969

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I, Mrs. Rudolfo Espinoza, made application for a job as a sewing machine operator, on the date mentioned above. After making application I was told I would be notified for this job, when I was not notified after about a week. I went back to the company to inquire about my application, I was told I was eliminated from the job, by not being a citizen of the United States of America. I am married to Rudolfo Espinoza who was born in San Antonio, Bexar County, Texas on September 17, 1939, presently being a native born citizen of the United States of America. My marriage license was issued through the Bexar County Court House at San Antonio, Texas and our Marriage Certificate was issued through Judge Gutierrez who married us at his office in the same court house.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date Aug 2 1969

Subscribed and sworn to before me this

day of

Aug

1969

Notary Public in and for Texas

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form signed.

Form EEOC-8 (REV. 7-68)

FORM EEOC-8 (REV. 7-68)

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
REGIONAL OFFICE
800 E. 5TH STREET
AUSTIN, TEXAS 78701

Form EEOC 910
6-72-5017

RECEIPT FOR SERVICE OF CHARGES

VS.

Fareh Manufacturing Company

Charge Numbers and Name of Complainants or Charging Parties

TAUD-0096 Mrs. Rudolfo Espinosa

I hereby acknowledge receipt of a copy of each complaint or charge identified and of any documents attached thereto alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

These documents were received from the representative of the Equal Employment Opportunity Commission identified below on Feb 12, 1970 at 1000 Frio City Road, San Antonio, Texas

The signing of this receipt for service does not constitute admission of any violation of Title VII of the Civil Rights Act of 1964 or of any other law.

Signature [Signature]

Title Plaintiff

I certify that I personally delivered the documents identified above.

[Signature]
Equal Employment Opportunity
Commission Representative

NOTE: Title VII, Sec. 706(a) of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer or other respondent to discriminate against any individual because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.

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B

Summary of Tab

- (1) c/p applied for employment at Respondent Company on July 19, 1969, as a seamstress on sewing machine operator.
- (2) c/p told by Respondent that she could not be employed because she was not an American Citizen.
- (3) c/p told Respondent it would be five (5) years before she could become an American citizen.
- (4) c/p's ability to communicate in English is limited.

c/p Statement:

(1) Affidavit signed c/p/p

Tab B

AFFIDAVIT

STATE OF TEXAS

COUNTY OF EL PASOI, MRS. ROSALVO RODRIGUEZ (Cecilia)

AFTER BEING DULY SWORN, UPON MY OATH DEPOSE AND SAY:

I WAS BORN November 21, 1916, AND I LIVE AT 315 Baraball
(No. and street)Street , CITY OF San Antonio, COUNTY OF Parish , STATE OF TexasMY TELEPHONE NUMBER IS LA 512 924-1531I AM EMPLOYED AT CITY OF LA, STATE OF WHERE MY TELEPHONE NUMBER IS LA, I HAVE BEENEMPLOYED THERE SINCE , AND MY POSITION IS NOW THATOF

I MAKE THE FOLLOWING STATEMENT OF MY OWN FREE WILL:

I have had grade education which I obtained in Mexico. I have taken some English courses - West Lee House, San Antonio, Texas for two months. I am presently unemployed and have no working experience. In Mexico, I worked in a grocery store. I have no experience as machine operator.

On 3/12/1969, I went to Farmer Bros. Restaurant Company and filed an application for employment. I was told to return the following week, at which time they told me that I could not be considered for the job, because I was not a citizen of the United States. I was born in Mexico, but I resided in San Antonio, Texas for several years. The persons who work there, told me that they were hiring. I applied for working machine operator or waitress. The persons who took my application were the Spanish-Speaking Committee. I was told that they would contact me, but when I returned the following week, I was told that I could not be hired because I had to be an American citizen. I told her that I could not be an American citizen until I would have 5 years, but that I was married to an American citizen, and we had a child who had been born here in the U.S. My husband was present, and he helped me fill out the application. I believe that the persons who were hired were Spanish-Speaking Americans (American citizens). Belinda Garcia knows of my submitting an application.

I believe that I have been denied employment opportunity because of my national origin (Mexican) and for reasons beyond my control, I have not been able to become an American citizen. Thus, I believe that I have been discriminated against by Ferrer Manufacturing Company by refusing to hire me.

I HAVE READ THE ABOVE STATEMENT CONSISTING OF 2 PAGES,
AND I SWEAR OR AFFIRM THAT IT IS TRUE, TO THE BEST OF MY
KNOWLEDGE AND BELIEF.

SIGNED: Cecilia M. Espinoza

SUBSCRIBED AND SWORN TO BEFORE ME AT El Paso, TEXAS,
ON THE 7 DAY OF February, 1990.

[Signature]
EQUAL EMPLOYMENT OFFICER
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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AFFIDAVIT

TAU _____

STATE OF TEXAS

COUNTY OF Brewer ss.

I, Cecilia Espinosa, AFTER BEING DULY SWORN, UPON
MY OATH DEPOSE AND SAY:

I WAS BORN Nov. 23, 1946, AND MY SOCIAL SECURITY NUMBER
IS 459-02-1038. I LIVE AT 115 ROSABELL
(No. and street)

CITY OF SAN ANTONIO, COUNTY OF BEVIL.

STATE OF TEXAS, AND MY TELEPHONE NUMBER IS 433 7768.

MY DUTIES AT n/a INCLUDE(ED) THE FOLLOWING:

I WORK(ED) IN THE n/a DEPARTMENT WHERE THE
FOLLOWING IS THE PRIMARY TYPE OF WORK AND OUTPUT:

MY IMMEDIATE SUPERVISOR OR LEADMAN IS (WAS) n/a
(name)

(title) : HIS SUPERVISOR IS (WAS) _____
(name)

(title) : HIS SUPERVISOR IS (WAS) _____
(name)

(title) _____

TAU _____, PAGE 2

THE FOLLOWING PEOPLE HAVE FIRSTHAND KNOWLEDGE OF MY WORK (THE IMMEDIATE SITUATION) AND CAN TELL YOU ABOUT IT:

RACE, NAT'L. ORIGIN, SEX	NAME	TITLE	ADDRESS	PHONE
S.S.A.	Edo Luvale / Santa Monzello	1/2	P.O. Box 328 San Antonio, Tex.	PE 363-96

INCLUDING MILITARY AND TRADE SCHOOLS, I HAVE HAD THE FOLLOWING EDUCATION AND TRAINING:

DATES	LOCATION	NAME AND TYPE OF SCHOOL	TYPE OF TRAINING	DEGREE (CERTIFICATE)
1960	Zacapa CHCA.	Cecilia Cruz Andrade		None

THE FOLLOWING HAS BEEN THE MORE IMPORTANT WORK EXPERIENCE (INCLUDING MILITARY) WHICH I HAVE HAD, STARTING WITH THE MOST RECENT AND WORKING BACK:

DATES	COMPANY/ORGANIZATION	NAME, ADDRESS OF IMMEDIATE SUPERVISOR	MY TITLE & DUTIES	REASON FOR LEAVING
1964	Casa Galinda Grocery Shue	Mrs. Mercedes Calenda Zacapa, Chm	Check.	left Mex.

THE FOLLOWING ARE THE WARNINGS, DISCIPLINE, AWARDS, AND SO FORTH,
WHICH I HAVE RECEIVED FROM MY PRESENT (RECENT) EMPLOYER:

DATE	SUPERVISOR	ACTION AND CIRCUMSTANCES
------	------------	--------------------------

n/a

THERE ARE ~~ARE NO~~ SEGREGATED FACILITIES AT THE RESPONDENT'S
(mark out one) *n/a*
FACILITIES. (IF THERE ARE, I HAVE GIVEN AN EXPLANATION OF WHAT THEY ARE,
HOW THEY ARE SEGREGATED, WHERE THEY ARE, AND HOW I KNOW, ON THE BACK
OF THIS PAGE.)

I ~~HAVE~~ ~~HAVE NOT~~ SEEN EEO POSTERS AT THE RESPONDENT'S FACILITIES;
(mark out one)
I KNOW WHAT THE POSTERS ARE BECAUSE ONE WAS SHOWN ME WHILE I WAS PRE-
PARING THIS STATEMENT.

Cost. small.

I HAVE READ THE ABOVE STATEMENT CONSISTING OF 1 PAGE, INCLUDING ANY
PART OF IT WRITTEN ON THE BACKS OF THESE PAGES, AND I SWEAR OR AFFIRM THAT
IT IS TRUE, TO THE BEST OF MY KNOWLEDGE AND BELIEF.

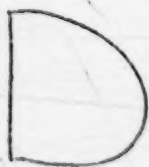
SIGNED: *Robert M. Collins*

SUBSCRIBED AND SWORN TO BEFORE ME AT 10 4th TEXAS, ON THE
DAY OF February, 1971.

[Signature]
EQUAL EMPLOYMENT OFFICER
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Summary of Tab

- (1) Respondent stated that force made-up of 80% Mexican-Americans.
- (2) Has been unwritten policy of Respondent Company to hire American Citizens only.
- (3) One exception has been made in hiring only American Citizens only.
- (4) Respondent refused to give name of individual hired who was not an American Citizen.

Statement made by Respondent

(1) Interview with William Grant 2/14/70

Tab D

RESUME OF INTERVIEW

Mrs. Edith G. Farnell, Pres. W. C.TAU 0-0086INTERVIEW DATE 2/12/70RESUME DATE 2/27/70INTERVIEWEE(S) Mr. William Farnell HIS/HER TITLE PresidentINTERVIEWEE(S) ADDRESS 1887 Liberty Road INTERVIEWED AT 1000 Erie City Rd.
San Antonio, Tex.
(City & State)El Paso, Texas
(City & State)PHONE 915/591-4444

PHONE _____

INTERVIEWED BY Rapport, Ethelbert SUGGESTED BY InvestigationINTERVIEWEE'S (S) BACKGROUND/SIGNIFICANCE: The interviewee(s), William Farnell, is (are) a (race, DO, sex, religion) Caucasian

STATEMENTS BY THE INTERVIEWEE(S):

Mr. William Farnell stated that he was surprised to find that a charge of discrimination has failed against the company based on National Origin. He stated he was surprised because about 90% of the work force here in El Paso and San Antonio is made up of Mexican-Americans. According to Mr. Farnell, at the time the successful policy of the company to hire only individuals who are American citizens. He stated that the time when the policy since the company was founded. At the charge was filed by the company, that employment opportunities of

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Sark M. Co. shall be made available just
as my to American Citizens.

He stated that an exception had been made
by Congress in giving only American Citizens.

Note: Mr. Sark refused to reveal the name
of the individual who was first convicted. He
does not an American Citizen.

In closing Mr. Sark stated he would take
this case to the Supreme Court if needed,
in order to continue his present living position.

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E

FULBRIGHT, CROOKER, FREEHAN, BATES & JAWORSKI
ATTORNEYS AT LAW
BANK OF THE SOUTHWEST BUILDING
HOUSTON, TEXAS 77002

February 16, 1970

Re: Unlawful Employment Practice Charge,
TAUC-0056, Mrs. Rudolfo Espinoza



Mr. Raymond Villareal
Equal Employment Officer
Equal Employment Opportunity Commission
300 East 8th Street
Austin, Texas 78701

Dear Mr. Villareal:

We are in receipt from our Client, Farah Manufacturing Company, the unlawful employment practice charge filed by the above named individual.

Long before the effective date of Title VII of the Civil Rights Act of 1964, Farah Manufacturing Company practiced the policy of insuring equal employment opportunities for all individuals regardless of their race, color, religion, sex, or national origin. Because of this policy, the Company was amazed to receive this charge of alleged discrimination.

For many years Farah Manufacturing Company has consistently enforced a policy requiring as a condition precedent to employment applicants must be citizens of the United States. When operations commenced at the San Antonio facility a few years ago, this policy was continued. Naturally, this policy is not unique in that it is followed by many organizations, including the Civil Service Commission. Based on your conversation with Mr. Farah on Thursday, February 12, 1970, and your personal observation, it is apparent that the vast majority of employees at the San Antonio plant are of Latin descent. Therefore, under the facts of the present case, it is apparent that the instant charge is without merit.

Farah Manufacturing Company has always presented equal employment opportunity as a goal not yet reached and will continue to endeavor to apply this policy to all facets of its operations.

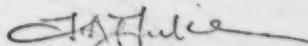
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Mr. Raymond Villarreal
February 16, 1970
Page -2-

advise. If we may be of any further assistance, please

Very truly yours,


Tommy B. Duke
For the Firm

TBD/ef

cc- Mr. William F. Farsh
4304 Donnybrook Place
El Paso, Texas 79902

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EQUAL EMPLOYMENT OPPORTUNITIES
REGIONAL OFFICE
300 E. 5TH STREET
AUSTIN, TEXAS 78701

DIVISION

RECEIVED
478-1000

February 19, 1971

CHARGE NO: 7AD-00086

Mr. William French
4304 Drury Lane K PL.
El Paso, Tx. 79912

So far as I can tell at this time, my investigation of the charge identified above is complete. My next step will be to prepare a written report which will go to Washington as a basis for a decision by the Commission. You will receive that decision directly from Washington.

I wish to be sure that you are aware that you now have an additional opportunity to make any further written response to the charge which you desire to make, placing your position and any new evidence you may have clearly in the record or report and thus before the Commission. Such a written response is not required, of course. If you do wish to offer an additional written statement of position, I will be pleased to receive it within ten (10) days of your receipt of this letter so that I can make it a part of the permanent file placed before the Commission.

As mentioned, I believe that my investigation is complete. However, it may be that the Commission will decide that some additional information is required; if that happens, you will be notified. In the meantime, please accept my thanks for your cooperation during the course of this investigation. It was a pleasure to learn more about your organization.

Sincerely,

Equal Employment Officer

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Investigation was taken on a tour of the plant, by Mr. William French, President of the Company. During the tour it was noticed that there were no segregated facilities and EEO posters were displayed.

During the tour, it was also noticed that about 95% of the employees were S.S.A's. The two girls in the office were also S.S.A's.

Tour of facilities

(1) Tour of plant conducted on 2/10/70.

Tab H.

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I

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EEO-1 Report
(1) EEO-1 y 1969

Tab I

San Antonio is in Bexar County in what is frequently referred to as "central Texas." It is not near any city of substantial size. While it has numerous small industries, especially clothing manufacture and steel products, its population is primarily supported by Air Force and Army installations. The city has - for Texas - an active Human Relations Committee which is an arm of the city government; the committee has no power but to investigate and to publicize, however.

Unemployment is unusually high for larger Texas cities - commonly well over 4%. The total population is over 900,000 for the SMSA; of that population, just under 50% is SSA; and about 6.5% is Negro. The SSA population is concentrated in the western portion of the city, in the vicinity of Kelly Air Force Base (which employs about 10% of the labor force in the SMSA); the Negro portion of the population is in the southeast part of the city.

Tab 5

Supreme Court of the United States

No. 72-671

Cecilia Espinoza and Rudolfo Espinoza,

Petitioners,

v.

Farah Manufacturing Company, Inc.

ORDER ALLOWING CERTIORARI. Filed April 23 -----, 1973

The petition herein for a writ of certiorari to the United States Court of

Appeals for the Fifth ----- Circuit is granted.

23671 . FILE COPY

Supreme Court, U. S.

FILED

OCT 21 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. **72-671**

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Petitioners,

v.

FARAH MANUFACTURING CO., INC.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

HARRIET RABB
GEORGE COOPER
435 W. 116th St.
New York, N.Y. 10027
(212) 280-4291

RUBEN MONTEMAYOR
1414 Tower Life Bldg.
San Antonio, Texas 78205

Attorneys for Petitioners

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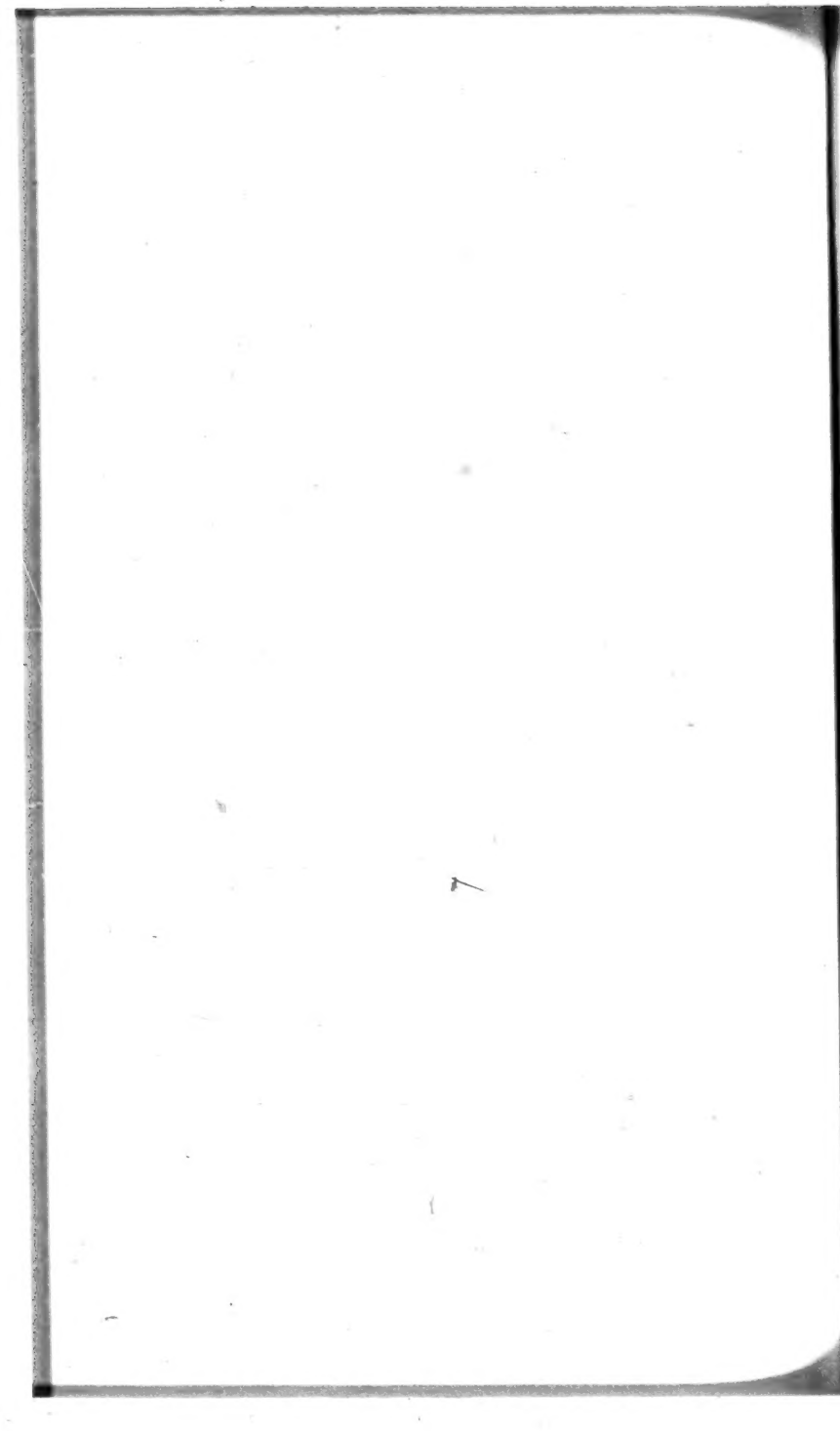
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Petitioners.

v.

FARAH MANUFACTURING CO., INC.,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on May 31, 1972.

Citation to Opinions Below

The opinion of Judge Suttle granting plaintiff's motion for summary judgment appears in the Appendix, *infra*. The opinion of the Circuit Court of Appeals and the denial of the petition for rehearing are reported in 462 F. 2d 1331 and appear in the Appendix, *infra*.

Jurisdiction

The judgment of the Fifth Circuit Court of Appeals was entered on May 31, 1972. Petitions for rehearing and for rehearing en banc were denied on July 21, 1972. On October 11, Mr. Justice Powell extended the time for filing a petition for certiorari to and including October 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

1. The federal statute involved is § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which provides:

"It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

2. The regulation involved is an Equal Employment Opportunity Commission guideline on discrimination because of national origin, 29 C.F.R. § 1606.1(d). This regulation provides:

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in the country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to

employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question."

Question Presented

Whether an employer's admitted policy of excluding resident aliens from employment constitutes a violation of the prohibition against discrimination on the basis of national origin contained in Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

Statement

This is an action brought by a lawfully admitted resident alien who was denied employment because she is not a United States citizen.

The Petitioner, Mrs. Cecilia Espinoza lives in San Antonio, Texas with her husband, a United States citizen. On or about July 19, 1967, the Petitioner applied for employment at Respondent's San Antonio plant. The Respondent refused to consider her application because she is not a United States citizen. None of the above stated facts are disputed.

After filing a charge of discrimination with the Equal Employment Opportunity Commission and receiving a Notice of Right to Sue (29 C.F.R. § 1601.25b(d)), Mrs. Espinoza brought this civil action. The Regional Director of the EEOC issued Findings of Fact indicating that the Respondent's policy has been to reject non-citizen applicants, that no reason was given for the existence of this policy, and that there is no national security justification

for the policy. Supplemental Appendix in the Fifth Circuit, pp. 42-43.

The District Court granted Petitioner's Motion for a Summary Judgment, holding that Respondent Farah Manufacturing Company's admitted policy of refusing to hire resident aliens constituted discrimination on the basis of national origin as prohibited by Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). On appeal, the Court of Appeals for the Fifth Circuit reversed.

Reasons for Granting the Writ

The decision below should be reviewed because its unreasonable interpretation of the term "national origin" threatens to thwart the basic purpose of Title VII and to leave unprotected the group perhaps most in need of protection against employment discrimination. It is, moreover, inconsistent with other recent decisions of this Court and general Federal policy expressed in related statutes.

I.

The decision below is a clearly and seriously erroneous interpretation of Title VII which deprives a critical and vulnerable group of the protections which the law should offer to them.

The issue posed by this case is a very simple one: yet it has a major impact in determining whether a key minority group will be given the protection which Title VII offers. This minority group is resident aliens. The history of these aliens—Irish, Chinese, Italian, Jew and Mexican alike—has been a history of discrimination, and in par-

ticular, job discrimination. The warning "None need apply but Americans" in Boston newspapers of the mid-1800's¹ was not an isolated event in American history. This was the typical pattern of immigrant treatment which persisted for each group until it became assimilated.²

The Farah Manufacturing Company will not hire immigrants unless and until they become citizens. Mrs. Espinoza, the petitioner here, is a lawful resident alien. She is the wife of an American citizen. Farah's policy is, therefore, not concerned with fears of becoming implicated in illegal immigration. Nor is there any other business justification advanced for Farah's practices; indeed the Fifth Circuit strongly suggested that the practice was arbitrary in terms of business needs.³ The practice is plainly and

¹ O. Handlin, *Boston's Immigrants* 62 (1959).

² "For want of alternative, the immigrants [during the late 1800's] took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and miserable working conditions characteristic of the sweatshops and homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all.

* * *

Escape from the ranks of unskilled labor was, however, not easy and became steadily more difficult. The want of skill and capital was always a handicap. But, in addition, discrimination against the newer ethnic groups grew even more intense, especially after the turn of the century."

O. Handlin, *The Newcomers* 24 (1959) (emphasis added.)

See generally, Reports of the Immigration Commission, 61st Cong., 3d Sess., Senate Doc. No. 747 (1911), especially Vol. XIX, p. 209, Table 74, (occupational disadvantage of foreign-born); Vol. I, p. 394, Table 42, p. 401, Table 48 (pay disadvantage of foreign-born in same jobs as native born); Vol. I, pp. 683-687 (particularly bad situation of Mexican aliens).

³ "Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. We hold that refusal to hire non-citizens is one of them." 462 F.2d at 1334.

simply an open prejudice against aliens. That bald fact is admitted on the record.⁴

It is of course true that Farah's discrimination against aliens is not in one sense "national origin" discrimination because Farah does not discriminate against all Mexicans or Italians—only against non-citizen ones. The Fifth Circuit focused on this point and upheld Farah's practice by reading Title VII rigidly and holding that only discrimination against all members of a particular national origin group would invoke the law.

This interpretation is wholly unsound; it is an unreasonable reading of the statute which exhibits a misunderstanding of the nature of national origin discrimination; it is a reading which would undermine the goals of the statute; and it is a reading which contradicts the EEOC's interpretation of the statute. There is nothing in the legislative history of Title VII that compels or even suggests the interpretation of the Fifth Circuit. That interpretation must be promptly repudiated to assure that this critically vulnerable alien group is not left isolated from Title VII's protection.

A. The Fifth Circuit Interpretation is an Unreasonable Reading of the Statute.

First, the Fifth Circuit gave an absurd construction to statute because it failed to recognize that Farah's discrimination is nothing but a variation on the same prejudice, the same chauvinism and refusal to consider individuals on their merits, which has always been the essence of national origin discrimination. National origin discrimination is traditionally rationalized on grounds of patriotism

⁴ See Supplemental Appendix in the Fifth Circuit, p. 62; Appendix in the Fifth Circuit, p. 45 at Answer to Interrogatory No. 21.

and national loyalty, but when stripped of that mask it comes down to antagonism to people who are not "American" enough to satisfy the employer. By discriminating against aliens solely because they lack the American credential of citizenship, Farah is doing exactly what national origin discriminators have always done, and Title VII should be read reasonably to cover such practices.

The legislative history of Title VII gives no indication of what Congress meant by "national origin" discrimination, leaving the courts free to adopt whatever interpretation most accords with the purpose of the statute.⁵ One interpretation, admittedly, is that which the Fifth Circuit adopted: only specific discrimination against all members of specific nationality groups is "national origin" discrimination. But another interpretation is that "national origin" discrimination was addressed at a particular form of narrow-mindedness: the refusal to hire people who, because of their national origins and without regard to individual qualifications, are not totally "American." Given other prohibited kinds of discrimination—racial, religious—it is clear that protection of persons outside the white American male norm was the major thrust of Title VII. It seems only sensible to interpret "national origin" in the way most consistent with those other provisions.

⁵ The only definition of "national origin" in the legislative history that the Fifth Circuit was able to cite, and the only one that we have been able to find through our own extensive research is a brief quote from Representative Roosevelt:

"May I just make [very] clear that 'national origin' means national. It means the country from which you or your forebears came from." 110 Cong. Rec. 2548-49 (1964) as quoted in 462 F.2d at 1333.

This comment, in a context where the Congressman was simply attempting to distinguish "national origin" from "race", can hardly be said to be authoritative or even very relevant to the issue posed by this case.

Following this approach, discrimination against aliens is national origin discrimination because of nonconformity to the standard American citizenship norm. There is only one significant reason why a person living in the United States will not be a citizen—that is because he was born outside this country. The native-born are automatically citizens. Therefore, discrimination on grounds of alienage is discrimination based on a direct and inevitable consequence of foreign origins. Discrimination against aliens *qua* aliens is therefore discrimination because of national origin.

This Court has consistently interpreted Title VII in a reasonable way to best carry out its ultimate purposes, because that is the accepted judicial approach to a remedial statute of this nature. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Love v. Pullman Co.*, 404 U.S. 522 (1972); *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971). The Fifth Circuit's refusal to interpret "national origin" consistently with these earlier Supreme Court decisions, and to interpret it in the way which would be most consistent with other clauses of the statute and which would give the statute maximum effectiveness, is a serious error which would promptly be put aright.

B. *The Effect of the Fifth Circuit Interpretation Would Be to Undermine the Goals of the Statute.*

We have just indicated that Farah's practice should be declared unlawful because the practice is based on an invidious and unlawful intent to engage in discrimination against a group having foreign national origins. But, intent is not the only basis for striking down practices under Title VII; the effects of the practices are also critical. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

Here the effects of Farah's practices are, if anything, even more invidious than the intent. The Fifth Circuit

interpretation would, in effect, permit an employer to escape responsibility for national origin discrimination by limiting his discrimination to those persons who are most recently and most obviously of foreign extraction, while hiring more assimilated, and therefore more acceptable, foreigners. It is incredible to think that Congress meant Title VII to protect those of foreign extraction who do not need protection, while excluding those who most need it, yet that is precisely what the Fifth Circuit rule does. It permits Farah to escape liability for its refusal to hire Mrs. Espinoza because it is willing to hire other Mexicans who have become citizens.

The basic error in the Fifth Circuit's reasoning in this respect is that it simply ignores that fact that aliens are, by definition, persons of foreign national origin. The impact of discrimination against aliens as a group obviously and necessarily falls on the foreign born, which means that those with immediate foreign national origin are those who suffer. The reason why the Fifth Circuit fell into this trap of permitting discrimination against those most obviously within the scope of the statute's protection is that it mistakenly lumped together all persons who are "derived" from a particular country as a single national origin group, and measured discrimination by the employer's willingness to hire from that group. This concept of national origin discrimination focuses on ancestry rather than ethnicity. However, it is not the home of a person's ancestors which triggers national origin discrimination in the United States, but rather it is the visible signs of national origin—language, customs, dress, and the like. National origin discrimination is ethnicity discrimination, and the more ethnically different a person is, the more vulnerable he is to this form of discrimination.

The attainment of citizenship is a rough indicator of assimilation. The requirements for it are in large measure tests of the degree to which a person has adjusted to American society. Knowledge is required of English language, American history and American government.⁶ Thus, by the time an individual has acquired citizenship, he is well on his way to being absorbed into American society and to that extent, on the way to being free of discrimination. Moreover, he has acquired the tools, most notably language skills, needed to make his way in America. On the other hand, as the most recent and least assimilated of foreigners, aliens are most likely to be different and therefore most subject to national origin discrimination and they are least able to cope with the burdens of the discrimination. Yet, the Fifth Circuit interpretation allows an employer to openly discriminate against this most vulnerable group if he is willing to hire others of foreign extraction who are more assimilated and therefore less vulnerable.

The effect of Farah's employment policy in San Antonio is obvious. In an area where alien Mexicans constitute the principal immigrant group,⁷ Farah's policy serves to exclude those individuals of Mexican origin whose ethnic identification is strongest. In essence, Farah, by a neutrally-phrased policy, is screening out persons with high degrees of ethnicity, achieving results similar to those gained by an employer discriminating on the basis of observed characteristics. While hiring some persons of Mexican origin, Farah by its policy rejects those who are most appropriate for statutory protection.

⁶ See 8 U.S.C. 1423; Annual Report, Immigration and Naturalization Service 20-21 (1971).

⁷ In San Antonio, where Farah's plant is located, 1,479 of a total 1,927 admitted aliens are Mexican. Annual Report, Immigration and Naturalization Service 50, Table 12 A (1971).

C. *The Fifth Circuit Interpretation Rejects the Official Position of the Equal Employment Opportunity Commission. (EEOC)*

This Court has recognized that the interpretations given Title VII by the EEOC are entitled to "great deference", because of the obvious agency expertise in resolving ambiguities so as to best carry out the purposes of the statute. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

Here the EEOC's position is plainly expressed in its Guidelines on Discrimination because of National Origin, 29 C.F.R. §1606.1(d). According to these Guidelines it is unlawful to discriminate against a lawfully immigrated alien on the basis of citizenship except where national security justifications exist. Moreover, the EEOC has made clear its firm support of this Guideline as applied to the instant case. The EEOC appeared as amicus curiae in the Fifth Circuit strongly urging that Farah's practices be declared unlawful. When that view was not adopted, the EEOC petitioned for rehearing, urging even more vigorously that the Fifth Circuit rule would have serious adverse effects on the implementation of Title VII.

The Fifth Circuit recognized that the EEOC position was contrary to its decision but decided to reject the EEOC arguments. Such a rejection of agency views is appropriate only if the agency is plainly wrong, yet the Fifth Circuit could cite no clear legislative history or other source of authority for holding that the EEOC position was not a reasonable interpretation of the law.⁸ On this ground alone, the Fifth Circuit decision was obviously wrong and contrary to the views of the Court as laid down in *Griggs v. Duke Power Co.*, *supra*.

⁸ See note 5, *supra*.

II.

The Fifth Circuit decision is directly contrary to the previous decision of this Court in *Phillips v. Martin-Marietta Corp.*

In *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971), this Court was confronted with a sex-discrimination situation issue identical to the national origin discrimination issue raised in this case. The employer in *Phillips* refused to hire women with pre-school children, but claimed that he was pure in the eyes of the law because he freely hired other women. Indeed, 75-80% of those hired in the position applied for by Mrs. Phillips were women. 400 U.S. at 543. This was the so-called "sex-plus" defense—that it was permissible to refuse to hire women with special characteristics, so long as the refusal did not extend to all women. The Court rejected this defense unanimously, ruling that "sex-plus" was discrimination nonetheless under Title VII.

Here Farah is claiming that its refusal to hire Mrs. Espinoza is permissible because it does not extend to all Mexicans. Rather it covers only Mexicans who are not citizens and thus it is "national origin-plus" discrimination. But if "sex-plus" is unlawful, so too is "national origin-plus", and the Fifth Circuit decision should be reversed on the authority of *Phillips v. Martin-Marietta*.

III.

The Fifth Circuit decision is inconsistent with recent decisions giving aliens protected status under the Fourteenth Amendment.

Takahashi v. Fish and Game Comm., 334 U.S. 410 (1948) and *Graham v. Richardson*, 403 U.S. 365 (1971) have clearly established that classifications based on alienage are inherently suspect and subject to special judicial scrutiny. Writing for the Court in *Graham*, Mr. Justice Blackmun emphasized that

“Aliens as a class are a prime example of a ‘discrete and insular minority . . . for whom . . . heightened judicial solicitude is appropriate.’” 403 U.S. at 372.

While these rulings under the Fourteenth Amendment have no binding effect under Title VII, it should be obvious that the same considerations which underlie the Court’s definition of suspect classes under the Constitution also underlie the Congress’ definition of protected classes under Title VII. Race is the basic protected class in both instances, and in both instances other groups with similar vulnerability have also been brought in. While exact parallels between the scope of the Fourteenth Amendment and Title VII are not to be expected, certainly the “judicial solicitude” which supported the *Graham* decision ought not be transformed into a judicial harshness when the courts turn to Title VII, which is the private employment analog of the Fourteenth Amendment. Yet the Fifth Circuit decision is plainly as insoucious of the interests of aliens as it can be. If the policy and attitudes supporting *Graham* are given any sway at all in interpreting Title VII, discrimination against aliens would surely be viewed as a form of forbidden national origin discrimination.

IV.

The Fifth Circuit decision interprets Title VII in a manner inconsistent with federal policy expressed in the immigration laws.

Federal immigration laws express a clear concern with assuring the employability of aliens. "Aliens who are paupers, professional beggars, or vagrants" are excluded from admission to the United States [8 U.S.C. § 1182 (a)(4)], as are aliens who are likely to become public charges [8 U.S.C. § 1182(a)(15)]. Aliens shall be deported who have "within five years of entry become a public charge from causes not affirmatively shown to have arisen after entry" [8 U.S.C. § 1251(a)(8)], and an alien likely to become a public charge may be admitted upon the posting of a bond [8 U.S.C. § 1183]. Most importantly, 8 U.S.C. § 1182(a)(14) excludes aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor unless the Secretary of Labor has determined that (a) there are not sufficient workers in the United States at the appropriate time and place who are "able, willing, qualified and available" to perform such labor and that (b) "the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . ." The conclusion is inescapable that those aliens who are admitted into the United States are expected to be employed.

The interpretation which petitioners urge would permit Title VII to support and assist this important national policy. The Fifth Circuit decision, on the other hand, renders Title VII ineffectual against private employers who act so as to undermine immigration policy.

CONCLUSION

The decision below is an unreasonable interpretation of Title VII which deprives a critical minority of the statute's protection. This decision is inconsistent with prior Supreme Court decisions under Title VII and the Fourteenth Amendment and is inconsistent with national immigration policy. This Petition for Writ of Certiorari should be granted and the decision below promptly reversed.

Respectfully submitted,

HARRIET RABB
GEORGE COOPER
435 W. 116th St.
New York, N.Y. 10027
(212) 280-4291

RUBEN MONTEMAYOR
1414 Tower Life Bldg.
San Antonio, Texas 78205
Attorneys for Petitioners

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 71-3364
Summary Calendar*

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Plaintiffs-Appellees,
versus
FARAH MANUFACTURING COMPANY, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(May 31, 1972)

Before:

BELL, DYER and CLARK,
Circuit Judges.

CLARK, Circuit Judge: This appeal requires us to decide which practices Congress intended to prohibit when it made it unlawful for an employer "to fail or refuse to hire

* Rule 18, 5th Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of N.Y.*, 431 F.2d 409, Part I (5th Cir. 1970).

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... any individual ... because of such individual's ... national origin." 42 U.S.C.A. § 2000e-2 (a) (1). More precisely, we must determine whether the words "national origin" should be read to mean, or at least include, "citizenship." Since we conclude they should not; that none of the reasons offered for doing so will withstand close analysis; that this is one of those cases where Congress should be taken at its words; and that, put simply, "national origin" means exactly and only that, we reverse the judgment below.

The material facts are clear and undisputed. Cecilia Espinoza, plaintiff-appellee in this cause, is a lawfully admitted resident alien living in San Antonio, Texas with her citizen husband. In July 1969 she was refused employment at the San Antonio division of Farah Manufacturing Company, defendant-appellant, because she was not a United States citizen. This refusal was based upon a long-standing policy of the company, established by its founder for security reasons. The merits of such a policy are not at issue here, but rather we examine the company's right to enforce it in light of Title VII of the Civil Rights Act of 1964.

Subsequent to Farah's refusal of employment, Espinoza filed a charge with the Equal Employment Opportunity Commission, alleging that Farah had discriminated against her on the basis of her national origin—which is Mexican—in violation of Title VII. After making findings of fact, the EEOC, under provisions of the Act, authorized Espinoza to bring suit in federal court since no administrative solution to the complaint was forthcoming.

The EEOC Regional Director found, and the parties have never contested, that Espinoza was not denied employment because she is Spanish surnamed. Indeed, the

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district judge found that "persons of Mexican ancestry make up more than 92% of defendant's total employees, 96% of its San Antonio employees, and 97% of the people doing the work for which plaintiff applied." The judge concluded that there was *no discrimination on the basis of ancestry or ethnic background*. Thus, this is not a case wherein an employer has feigned adherence to a policy which is no more than a subterfuge designed to conceal a brand of discrimination the Act prohibits. The record before us makes it unquestionable that Espinoza was denied an opportunity for employment because she lacks United States citizenship, and for no other reason.

The court below, upon motions for summary judgment by both sides, granted Espinoza relief by enjoining Farah from further refusal to hire her on the basis of her citizenship. This appeal followed.

We are keenly aware of the broad policy commitment of Title VII, and of the guarantee Congress made therein that "all persons within the jurisdiction of the United States" should have the opportunity for employment free from *specified kinds of discrimination*. It is in fact this court's duty "to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Culpepper v. Reynolds Metal Company*, 421 F.2d 888, 891 (5th Cir. 1970). However, as Judge Bell remarked, though we approach the statute "in a generous way," we yet "want to stay within the intent of Congress in making it work." *Id.* at n. 3. Thus, while Farah's policy could be characterized as arbitrary and there is little doubt that Congress could have acted to prohibit its practice, the question remains: Has Congress so acted?

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Several general principles guide us in our construction of this statute. The first is that we not read it mechanically, *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968), nor in a fashion so confined to the bare words that our literalism risks a strangulation of meaning. *Lynch v. Overholser*, 369 U.S. 705, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962). Here, there is no such risk. We find the words "national origin" to be entirely clear and unambiguous, both standing alone and in the context in which they appear in the statute.

In such a situation, a second well-settled principle provides that where the meaning of the words is plain, no resort need be had to legislative history. *United States v. Public Utilities Commission*, 345 U.S. 295, 314, 73 S.Ct. 706, 717, 97 L.Ed. 1020 (1953); *Ex parte Collett*, 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207, 1211 (1949); *General Electric Company v. Southern Construction Company, Inc.*, 383 F.2d 135, 138 (5th Cir. 1967). *See also United States v. Bass*, 40 U.S.L.W. 4101, 4102 (U.S. Dec. 20, 1971). We have nevertheless considered the history of this section of the Act to be assured that Congress did not intend something entirely different from the normal meaning of the words they used. Our investigation lent not one iota of support for the interpretation Espinoza here urges. On the contrary, the single direct definition given to "national origin" in the history of the Act is completely consistent with the ordinary and expected import of those words:

May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country.¹

¹ 110 Cong. Rec. 2548-49 (1964) (remarks of Congressman Roosevelt, Chairman of the House Subcommittee reporting the bill).

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Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her parents' birthplace—all of which characteristics she shared with the vast majority of Farah's employees. Rather she was refused employment—irrespective of what her national origin may have been—because she had not acquired United States citizenship. Neither the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress.

It avails Espinoza naught to argue that by denying her relief we thwart the Act's general purpose of bringing to every man and woman in this country the opportunity to "provide for one's family in a job or profession for which he [or she] qualifies and chooses." *Culpepper, supra* at 891. Laudable though this objective may be, we have not the authority to declare unlawful any and all activities that might impede its effectuation. Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. We hold that refusal to hire non-citizens is one of them. Though the general policy of the Act doubtless was to halt arbitrary employment practices, through the unmistakable words of the Act's actual text Congress has offered its conception of the specific spheres in which this general policy is to operate, and thereby has necessarily limited the policy's outreach. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct., 1772, 26 L.Ed.2d 339 (1970).

There remain two other theories espoused by Espinoza as being supportive of her case. The first relies upon the text of an EEOC regulation which provides:

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Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . .²

We agree that in many situations discrimination on the basis of citizenship would indeed be banned by the Act, *e.g.*, where such a practice is symptomatic of or a necessary element within prohibited national origin discrimination, or where it is a mere pretense to camouflage national origin discrimination. In such situations we would find this regulation enforceable as a proper effectuation of the Act. However, no such situation exists here. The parties are agreed that the citizenship discrimination in the case at bar was neither part of a larger plan, nor a cover-up for some other motive. Thus, to the extent such discrimination has been declared by the EEOC to be *per se* illegal, we refuse to follow its regulation. The "great deference" the Supreme Court has found to be due that agency's interpretation of the Act, *Griggs v. Duke Power Company*, 401 U.S. 424, 434, 91 S. Ct. 849, 855, — L.Ed.2d —, — (1971), does not require a different result. In *Griggs*, the Court found that "(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress." 401 U.S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that "the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent." 401 U.S. at 436.

² 29 C.F.R. § 1606.1 (d).

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As previously discussed, we do not have before us analogous circumstances. While acknowledging deference is due, blind adherence is not.

The final theory Espinoza urges would have us penalize Farah's activity for being a classification "based on alienage" which "like those based on nationality and race" is "inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, — U.S. —, —, 91 S.Ct. 1848, 1852, — L.Ed.2d —, — (1971). Certainly *state action* which discriminates against persons on the basis of their citizenship, or lack thereof, threatens to run afoul of the Fourteenth Amendment. *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 31 (1915); *Chapman v. Gerard*, 40 U.S.L.W. 2565 (3rd Cir. Feb. 28, 1972). Moreover, the original purpose clause for Title VII of H.R. 7152, 88th Cong., 2d Sess. § 701(a) (1964), provided that "*all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of . . . national origin.*"³ (emphasis added). Neither of these factors is of any aid to our construction of 42 U.S.C.A. §2000e-2 (a) (1). As to the state action cases, it should be noted that no constitutional attack is being made here; nor could there be.⁴ What the state cannot constitutionally prohibit has

³ See H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S.C. Cong. Admin. News, p. 2401 (1964).

⁴ We do not understand Espinoza to contend that this statute would be constitutionally suspect for *failing* to prohibit discrimination against aliens. Obviously, such an argument would be without merit. *Williams v. Lee Optical Company of Oklahoma*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955); *Stone v. City of Maitland*, — F.2d — (5th Cir. 1971) [No. 30474, Aug. 4, 1971]; *E. B. Elliot Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1155 (5th Cir. 1970).

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no relationship to what a private individual can constitutionally practice. Regarding the purpose clause's "all persons" provision, it need only be said that the fact all persons are protected by the Act gives no definition to what they are protected from. As a person within this country's jurisdiction, Espinoza is unquestionably protected against discrimination based upon race, color, religion, sex, or national origin. Having found no persuasive reasoning to upset the ordinary meaning of the last of these five prohibitions, *see Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968), *reh. denied* 391 U.S. 929, 88 S.Ct. 1800, 20 L.Ed.2d 671, we conclude that Espinoza was not entitled to relief and that the summary judgment granted in her behalf must be

REVERSED.

Appendix

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(July 21, 1972)

Before:

BELL, DYER and CLARK,

Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appendix

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

SA-70-CA-353

CECILIA ESPINOZA ET VIR

v.

FARAH MFG. CO., INC.

MEMORANDUM OF DECISION

This is a civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Both sides have moved for Summary Judgment on the issue of violation, and the Court, having considered the pleadings, motions, briefs in support thereof, and comments of counsel, finds and rules as follows:

The material facts are undisputed. Named plaintiff is a lawfully admitted resident alien living in San Antonio, Texas, with her citizen husband. Defendant is a manufacturer of clothing and is an "employer" within 42 U.S.C. § 2000e(b). On or about July 19, 1969, plaintiff was refused employment at defendant's San Antonio facility because she was not a citizen of the United States. The Regional Director, Equal Employment Opportunity Commission, confirmed the reason for refusal, finding no evidence "that Respondent refused to employ Charging Party

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because she is Spanish Surnamed.”¹ Indeed, persons of Mexican ancestry make up more than 92% of defendant’s total employees, 96% of its San Antonio employees, and 97% of people doing the work for which plaintiff applied, negating discrimination on the basis of ancestry or ethnic background. Defendant has, however, and will continue to employ only citizens of the United States.²

Congress has declared it unlawful for an employer “to fail or refuse to hire . . . any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. §2000e-2(a)(1). The sole issue presented by the mutual Motions for Summary Judgment is whether a refusal to hire because of citizenship alone was prohibited as discrimination on the basis of “national origin.” The Court holds that it was and is.

Defendant argues that the Act’s failure to simply include “citizenship” as a prohibited classification must be viewed, in light of the careful consideration shown by the legislative history, as evidence of an intent to exclude it. See 2 U.S.C. Cong.&Admin.News pp. 2355 *et seq.* (1964). The Court finds the legislative history equally consistent with its view that alienage is included in “national origin” and, indeed, is elsewhere specifically excluded from coverage in employment “outside any State.” 42 U.S.C. § 2000e-1.

¹ The Director found and defendant confirms that its rejection of applicants for employment who are not citizens of the United States is based upon a long-standing policy established by its founder and that there is no national security justification for its policy.

² While the acquisition of Tex Mfg. Co. by defendant in June, 1971, resulted in its absorbing approximately 300 non-citizen employees who will not be discharged, the policy will be enforced with regard to new applications. See Defendant’s Amended Answer to Plaintiff’s First Set of Interrogatories, filed May 10, 1971.

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The original purpose clause for Title VII of H.R. 7152, 88th Cong., 2d Sess. § 701(a) (1964), declared that "*all persons within the jurisdiction of the United States* have a right to the opportunity for employment without discrimination on account of . . . national origin." See H.R. Rep. No. 914, 88th Cong., 2d Sess., 2 U.S.C. Cong.&Admin. News p. 2401 (1964) (Emphasis added). The Equal Employment Opportunity Commission, having enforcement responsibility, has issued a guideline on discrimination because of national origin providing as follows:

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship,"

29 C.F.R. § 1606.1(d) (1971). This interpretation is supported by the Act and its Legislative history and is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

Defendant argues that in order to correctly express the will of Congress "citizenship" and "national origin" must be distinguished and the first word of the above quoted guideline must be changed from "because" to "when." This Court disagrees. While "citizenship" and "nationality" may have different technical meanings, the term "national origin" is broad enough to encompass both. It is clear that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (Footnotes omitted). Like racial, sexual, or religious discrimination in employment, citizenship discrimination deals with

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"... the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics."

Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (Footnote omitted). For the Court to engage in the semantic battle fought by defendant, and to strictly construe "national origin" to exclude and permit employment discrimination on the basis of citizenship, would do violence to Congress's intent. By 42 U.S.C. § 2000e-2(a)(1) Congress meant to prohibit all invidious employment discrimination on the basis of national origin, including national ancestry, ethnic heritage, nationality and citizenship.³

Defendant points to the federal government's civil service policies which, while prohibiting discrimination on the basis of "national origin," limits employment to citizens of the United States. Compare 5 U.S.C. § 7151; Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), as amended, Exec. Order No. 11590, 36 Fed. Reg. 7831 (1971); with Federal Personnel Manual Supplement 990-1, § 338.101 (1969). But

³ England's Race Relations Act of 1968 has been so construed by Swanwick, J., holding that the Act's prohibition of discrimination on the ground of "national origins" required invalidation of a London Borough rule stipulating that an applicant for housing must be a British citizen. *London Borough of Ealing v. Race Relations Board* [1971] 1 All E.R. 424, noted by Zellick, *The Meaning of "National Origins,"* 121 The New Law Journal 341 (1971).

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whatever federal executive policy in governmental employment,⁴ Congressional policy regarding employment in interstate commerce is clear. It is to prohibit invidious discrimination based upon national origin, including citizenship or alienage. Congress has, pursuant to its broad constitutional powers to determine the conditions of entry and residence of aliens in the United States, provided a comprehensive plan for regulation of immigration and naturalization, including limitations designed to insure that aliens admitted will become a productive part of our society. See *Graham v. Richardson*, *supra* at 377. It is inconceivable that Congress would then, in equally comprehensive legislation pursuant to its broad constitutional powers to regulate interstate commerce, permit these aliens to be denied employment because not citizens. To the contrary, it was this, among other invidious employment discriminations, based upon "inherently suspect classifications," which Congress intended to, and the Courts must, prohibit.

In summary, the material facts are undisputed. Defendant intentionally refused to hire plaintiff because plaintiff was not a citizen of the United States. As a matter of law, this was a refusal to hire an individual "because of such individual's . . . national origin," and, hence an unlawful employment practice under 42 U.S.C. § 2000e-2(a)(1). While clearly not malicious, the intent with which defen-

⁴ The government is excluded from coverage under 42 U.S.C. § 2000e(b)(1), and the validity of this regulation is not before the Court. Similar State requirements may be questionable under the Equal Protection Clause; see *Graham v. Richardson*, *supra* at 374, citing *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); and/or the Supremacy Clause. See 29 C.F.R. § 1606.1(e); cf., *Local 246 v. Southern Calif. Edison Co.*, 320 F.Supp. 1262 (C.D. Calif. 1970).

Appendix

dant has and is engaging in this practice is sufficient to justify injunctive relief. *Local 189 v. United States*, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); see 42 U.S.C. § 2000e-5(g). It is, therefore ORDERED as follows:

1. Defendant's Motion for Summary Judgment is, hereby, in all things, denied.

2. Plaintiff's Motion for Summary Judgment is, to the extent reflected above and in the Judgment to enter, granted, and, to the extent requesting additional relief not herein designated, denied.

3. Judgment shall issue declaring that defendant's refusal to hire plaintiff was an unlawful employment practice and enjoining defendant from further engaging in such unlawful employment practice.⁵

4. The Court will direct further proceedings as may be necessary to determine any additional relief, not herein specifically granted, prayed in Petitioners' Second Amended Complaint, to which plaintiff may be entitled.

Entered this 21st day of September, 1971.

D. W. SUTTLE
United States District Judge

⁵ While this is a partial summary judgment under Rule 56(d), F.R.Civ.P., and hence interlocutory, it would appear appealable as inescapable from the granting of the permanent injunction, which is clearly appealable under 28 U.S.C. § 292(a)(1). See *Teamsters v. Braswell Motor Freight Lines, Inc.*, 428 F.2d 1371, 1373 n.3 (5th Cir. 1970).

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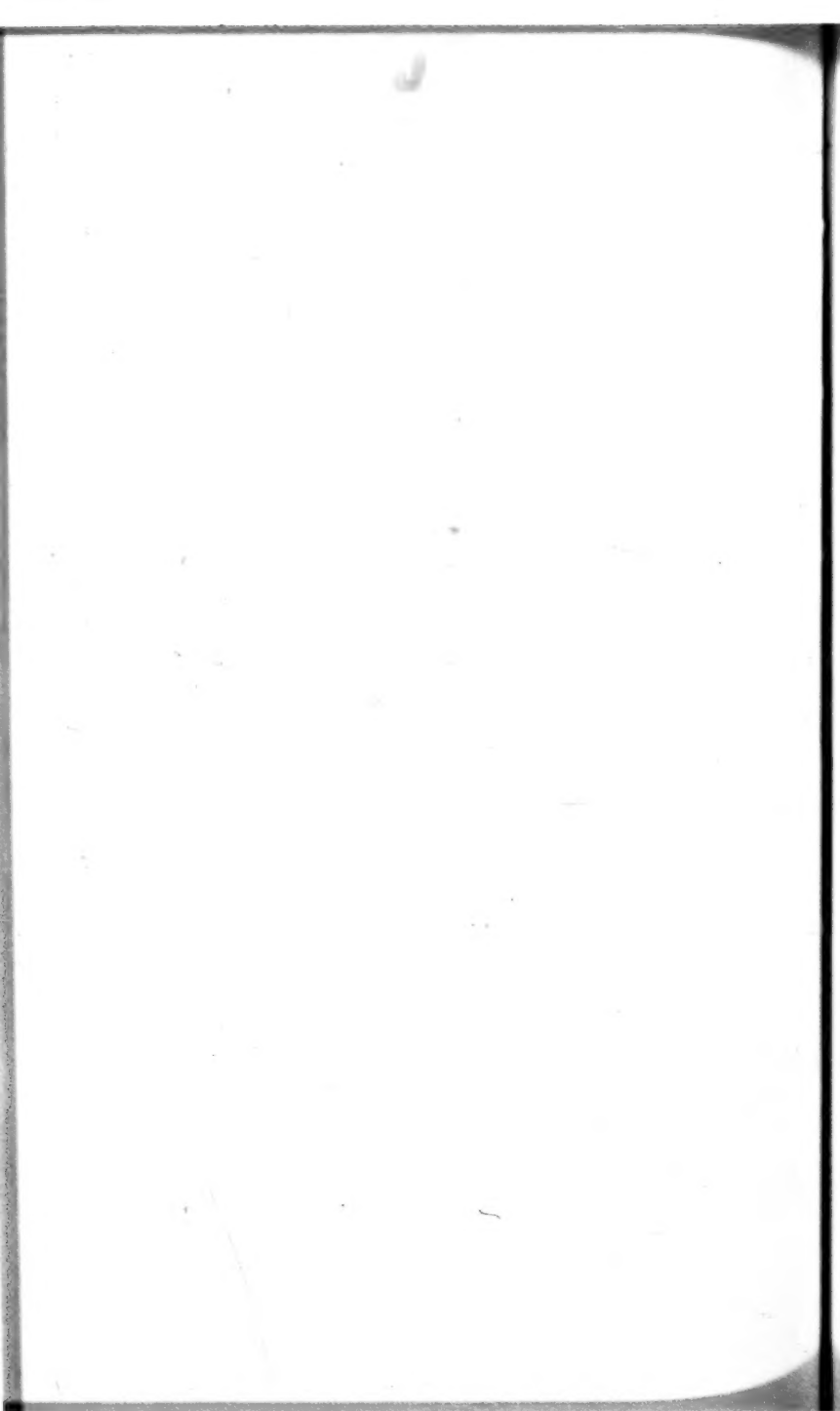
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,

vs.

FARAH MANUFACTURING COMPANY, INC.,
Respondent.

ON THE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

This Brief is filed in response to Petition for Writ of Certiorari by Petitioners, Cecilia Espinoza and Rudolfo Espinoza. Respondent, Farah Manufacturing Company, Inc., respectfully prays that writ be denied.

OPINIONS BELOW

The District Court opinion is reported at 343 F.Supp. 1205 and the Court of Appeals opinion at 462 F.2d 1331. Both appear in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (the "Act") and of Equal Employment Opportunity Commission Regulation, 29 C.F.R. § 1606.1(d) (1972) appear in the Petition at pages 2-3.

QUESTION PRESENTED

Whether Farah violated Section 703(a) of the Act by refusing to consider Espinoza for employment because she is not a United States citizen when more than 97% of Farah's employees in the position sought by Espinoza are of her Mexican national origin, as was the person hired in her stead.

STATEMENT

Espinoza, a resident alien whose national origin is Mexico, was denied consideration for employment by Farah pursuant to a long-standing employment policy which requires Farah employees to be United States citizens. Espinoza filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Farah had

discriminated against her on the basis of national origin in violation of Section 703(a) of the Act. The Regional Director of the EEOC issued his Finding of Fact which included determinations that: (1) Espinoza believed that the persons hired in her stead were Spanish surnamed United States citizens; (2) Espinoza's sister-in-law, a Spanish surnamed citizen was employed by Farah; (3) Farah's San Antonio plant employs about 625 persons, 95% of whom are Spanish surnamed Americans; and (4) "The evidence in the record does not establish that . . . [Farah] refused to employ . . . [Espinoza] because she is Spanish surnamed."¹

Upon issuance by the EEOC of a Notice of Right to Sue (29 C.F.R. § 1601.25b(d)) Espinoza brought suit. The District Court granted her Motion for Summary Judgment, holding that Farah had discriminated against her on the basis of national origin in violation of Section 703(a) of the Act.

The Court of Appeals reversed, finding that Espinoza was "denied an opportunity for employment because she lacks United States citizenship, and for no other reason." 462 F.2d at 1333; Petitioners' Appendix 3a. The Court held that "Neither the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress." 462 F.2d at 1333-34; Petitioners' Appendix 5a.

1. Appendix in Fifth Circuit 21-22. Although not included in the final form of his Finding of Fact, the earlier draft of "Regional Director's Finding of Fact," (Supplemental Appendix in Fifth Circuit 34) correctly sets forth the controlling issue and what Farah believes to be the correct disposition thereof:

"11. I find that the issue in this case is 'citizenship' and not national origin.

"12. I find no evidence in the record which indicates that [Farah] did not hire [Plaintiff] because of her national origin."

REASONS FOR DENYING WRIT

Farah wholeheartedly agrees with Representative Celler (D., N.Y.), author of an amendment which became a subsection of Title VII of the Act, who said, "[T]he court . . . cannot find any violation of the Act which is based on facts other—and I emphasize 'other'—than discrimination on the grounds of race, color, religion, [sex] or national origin."² The Fifth Circuit Court of Appeals apparently agrees, having correctly pointed out that Section 703 of the Act "does not prohibit discrimination on any classification except those named in the Act itself. Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969), *rev'd on other grounds*, 400 U.S. 542 (1971). When more than 97% of Farah's employees in a position sought by Espinoza are of her Mexican national origin, it is clear that she was not discriminated against on the basis of her national origin. Therefore, Farah has not violated the Act, and review by this Court on certiorari is unwarranted.

The Court of Appeals decision was correct on the facts, the clear and unmistakable language of the Act, and its legislative history. Furthermore, the decision is consistent with United States government hiring policy which denies employment to aliens and with state fair employment practices legislation. In *this case*, there simply is no discrimination on the basis of national origin.

2. 110 Cong. Rec. 2567 (1964). Remarks by Rep. Celler, author of an amendment which became § 2000e-2(g).

I.

The decision below is correct.

A. The Court of Appeals decision is correct on the facts and is consistent with Phillips v. Martin Marietta Corp.

The facts show overwhelmingly that Farah did not discriminate against Cecilia Espinoza on the basis of her Mexican national origin. The uncontroverted affidavit³ of Farah's corporate secretary, Pedro Villaverde, whose national origin is Mexico, indicates that at the time of the alleged violation in this case:

- (1) 92.5% of Farah's employees were of Mexican national origin,
- (2) 96.3% of the work force at the San Antonio plant was of Mexican national origin, and
- (3) 98.5% of the individuals employed in the position sought by Espinoza were of Mexican national origin. Appendix in the Fifth Circuit 29-30.

Espinoza does not allege that she was discriminated against on the basis of her national origin. The EEOC Regional Director found that Farah did not refuse to consider Espinoza because she is Spanish surnamed.⁴ Even the District Court acknowledged that the evidence negates "discrimination on the basis of ancestry or ethnic background." 343 F.Supp. at 1206; Petitioners' Appendix 11a. Finally, the Court of Appeals found that "Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her parents'

3. Appendix in Fifth Circuit 29-30.

4. Appendix in Fifth Circuit 21-22.

birthplace . . . [but] because she had not acquired United States citizenship." 462 F.2d at 1333; Petitioners' Appendix 5a. Farah does not disagree with this overwhelming consensus of opinion.

In the proper factual setting, Farah would not even quarrel with the basic thrust of EEOC guideline which provides:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . . 29 C.F.R. §1606.1(d) (1972).

Admittedly, a preference for United States citizens *could* be used to discriminate on the basis of national origin, but that is not the case here. As applied to the facts of this case, the EEOC guideline is inapposite.

Prior to its publication the EEOC agreed with Farah. The Regional Director in an early draft of his Finding of Fact correctly observed that "the issue in this case is 'citizenship' and not national origin."⁵ In 1967 the EEOC General Counsel held that discrimination against nonresident aliens did not constitute discrimination based on national origin. EEOC General Counsel's Opinion, 1 CCH Employment Prac. Guide ¶ 1220.20 (1967). That Farah's preference for United States citizens affects both resident and nonresident aliens does not alter the correctness of the General Counsel's opinion. Neither does the subsequent publication of the EEOC guideline. The uncontradicted facts of *this case* remain unchanged; Farah has not used its long-standing citizenship requirement in any way which has

5. See note 1 *supra*.

resulted in discrimination against Espinoza because of her Mexican national origin.

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), does not require a different result. Mindful of its holding that "sex-plus" discrimination is illegal, Espinoza categorizes Farah's preference for citizens as "national origin-plus" discrimination—apparently on the theory that the tacking of the word "plus" will turn the trick. The turning of a phrase, however, is not a viable substitute for analysis of *Phillips vis-a-vis* the facts at hand. In *Phillips* the employer refused to hire women with pre-school age children. When challenged by Mrs. Phillips, the employer argued that it was not guilty of sex discrimination on the theory that 75% to 80% of its employees were women; therefore, there could be no discrimination against women. The court disagreed. There was sex discrimination because men with pre-school age children were hired, but not women with pre-school age children. At first blush, it might seem that Farah is taking the same position as *Martin Marietta*: Farah did not discriminate against Espinoza, because more than 90% of Farah's employees share Espinoza's national origin. There is a crucial difference, however. In *Phillips* the job applicant was a woman with pre-school age children; no women with young children were employed, but men were. The result was sex discrimination. In the instant case, Espinoza is of Mexican national origin, but more than 90% of Farah's employees are of Mexican national origin. Espinoza has been discriminated against not because of her Mexican national origin (a prohibited basis of discrimination), but because of her citizenship (a basis of discrimination not prohibited by Congress). Turning a neat phrase—"national origin-plus"—does not change that.

It is abundantly clear—in fact, no one from Espinoza through the Court of Appeals has taken a contrary position—that Espinoza was not denied employment because of her Mexican national origin. Phillips does not require a different result. Therefore, the Court of Appeals decision is correct and the granting of a writ by this Court is unwarranted.

B. The Court of Appeals decision correctly interprets the clear and unambiguous language of the Act and its legislative history.

It simply will not do for Espinoza to argue that the Act *should* prevent employers from preferring United States citizens in hiring. The question is not whether it *should* have but whether Congress did prevent employment preference for citizens. Nor will it do to argue that the Court of Appeals decision “undermines the goals of the Statute.” That begs the question. What are the goals of the statute?

Proper statutory construction begins with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. *Richards v. United States*, 369 U.S. 1 (1962). It is difficult to perceive of any more precise language than “national origin.” The only direct definition of “national origin” in the Act’s legislative history comes with unmistakable clarity from Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill.

May I just make very clear that “national origin” means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country. 110 Cong. Rec. 2548-49 (1964).

The Minority Report on Title VII apparently reflects the same understanding of the term "national origin."

There is no material change in the substantive provisions of this title and its predecessor title defining "unlawful employment practices" hence the general coverage of both provisions is the same. In defining the basis of discrimination, the subcommittee proposal contained the words "to discriminate against any individual because of his race, color, religion, national origin, or *ancestry*." The pending bill omits the words "or ancestry." 2 U.S. Code Cong. & Ad. News 2445 (1964).

The Minority Report obviously felt that "national origin" and "ancestry" were synonymous. The use of both terms was clearly redundant, and deletion of "ancestry" did not change the provision's general coverage. Wishful thinking will simply not render the term "national origin" synonymous with "citizenship." As Senator Humphrey commented, Section 703(h) of Title VII "makes clear that it is only discrimination on account of race, color, religion, sex, or national origin that is forbidden by that title." 110 Cong. Rec. 12721-25 (1964).

There is no question that Congress could prohibit discrimination on the basis of citizenship or any other basis, but it has not yet done so. Although there is no need to resort to legislative history when, as here, the language of the statute is clear and unmistakable, the legislative history in all respects reinforces Farah's position that "national origin" does not mean "citizenship." The Court of Appeals decision is therefore correct.

C. The Court of Appeals decision is consistent with the federal government's employment policy which prohibits discrimination on the basis of national origin while limiting employment to United States citizens and with state fair employment practices legislation which prohibits national origin discrimination but sanctions private employer preference for United States citizens.

Since 1914 Civil Service Commission Regulations have limited the right to enter competitive examination for employment by the government to United States citizens. Executive Order No. 1997 (1914);⁶ see 5 C.F.R. § 338.101 (1972). Yet, since 1943, national origin discrimination in federal government employment has been prohibited.⁷ A former proviso to Section 701(b)⁷ of Title VII of the Act stated:

... That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin and the President shall utilize his existing authority to effectuate this policy.

In the course of reorganizing some United States statutes, the above proviso was repealed and re-enacted without material change as 5 U.S.C. § 7151. Furthermore, the Treasury, Postal Service, and General Government Appropriation Act, 1973 includes a provision that unless otherwise specified "no part of any appropriation contained in this

6. Exec. Order No. 9346 (1943) issued by President Roosevelt; Exec. Order No. 10308 (1951) by President Truman; Exec. Order No. 10479 (1953) by President Eisenhower; Exec. Order No. 10925 (1961) by President Kennedy; Exec. Order No. 10246 (1965) by President Johnson; and Exec. Order No. 11478 (1969) by President Nixon.

7. Civil Rights Act of 1964, Title VII, § 701(b), 78 Stat. 253 (1964).

or any other Act shall be used to pay compensation of any officer or employee of Government of the United States . . . unless such person is a citizen of the United States. . . ."⁸ Thus, it is readily apparent that the very legislative body which forbade discrimination in employment, both private and public, on the basis of national origin also imposes the citizenship requirement as a condition to employment by the federal government. Farah is doing no more than following the example set by the federal government, that is, interpreting its prohibition against national origin as being consistent with a citizenship prerequisite for hiring.

Wong v. Hampton, 333 F.Supp. 527 (N.D. Cal. 1971), is in point. Five resident Chinese aliens, two of whom had declared an intention to become United States citizens, filed suit against the Civil Service Commission when it denied them the opportunity to participate in competitive examinations. The plaintiffs contended that the Commission regulation allowing only United States citizens to take the examination violated Executive Order 11478 which prohibits national origin discrimination in federal government hiring and employment. The District Court disagreed. It interpreted Executive Order 11478 to mean that "as between United States citizens no distinction should be made on the basis of their respective national origins." (333 F.Supp. at 530; emphasis, the court's.) This, of course, is a logical result when a court is faced with an Executive Order prohibiting discrimination on the basis of national origin coupled with an even older government policy of restricting federal employment to United States citizens. The conclusion is inescapable that "national origin" and "citizenship" are not synonymous.

8. § 602 P.L. 92-351; 86 Stat. 471 (1972). (Emphasis added.)

Espinoza argues, however, that Farah's position is inconsistent with federal immigration policy, which is apparently concerned with the employability of aliens—so long as their employer is not the federal government. This argument is more appropriately addressed to Congress. The truth of the matter is that if "national origin" and "citizenship" are deemed to be synonymous, as Espinoza argues, the federal government will be obliged to abandon its citizenship requirement.

Furthermore, state fair employment practices legislation, which originated in New York in 1945, is consistent with Farah's position that a preference for United States citizens is not per se discrimination on the basis of national origin. By the time of the passage of the 1964 Civil Rights Act some twenty-eight states had fair employment practices legislation.⁹ New York, and virtually all other states, had included "national origin" and/or "national ancestry" among the prohibited grounds of discrimination. Nevertheless, "national origin" is not interpreted to encompass "citizenship." To the contrary, many states had followed New York's lead in holding expressly that an employer's continued imposition of a requirement of United States citizenship as a precondition for employment was not inconsistent with the state's ban on discrimination on the basis of national origin.¹⁰ Finally,

9. EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 5-6.

10. Eighteen states have published pre-employment inquiry guidelines which instruct an employer on lawful inquiries which can be made of a job applicant. All eighteen states prohibit discrimination on the basis of national origin, but allow an employer to ask whether the applicant is a United States citizen. The states are Arizona, California, Delaware, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia. Only New Jersey prohibits any inquiry about citizenship. See 2 CCH Employment Prac. Guide ¶ 20,000ff.

Minnesota, one of the states following New York's lead, defines "national origin" in its State Act Against Discrimination as "the place of birth of an individual or any of his lineal ancestors."¹¹

It is overwhelmingly clear that Farah's position is consistent with over thirty years of government hiring practice and accords with the interpretation adopted by a significant number of states which have adopted fair employment practices legislation and published pre-employment guidelines.

D. In light of the facts before it, the Court of Appeals correctly held inapplicable the EEOC guideline prohibiting discrimination on the basis of citizenship.

The EEOC policy guideline provides:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . . 29 C.F.R. § 1606.1(d) (1972).

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), this Court said that the EEOC interpretation of the Civil Rights Act was "entitled to great deference."¹² Both Farah and the Court of Appeals agree. But this Court went on to say, "*Since the Act and its legislative history support the Com-*

11. 2 CCH Employment Prac. Guide ¶ 24,401, § 363.01 Minn. State Act Against Discrimination, Minn. Stat. (1969).

12. This Court has directed that similar deference be paid to Interpretative Bulletins issued by the Department of Labor regarding the Fair Labor Standards Act:

"We consider that the rulings, interpretations and opinions of the Administrator under this Act while not controlling upon the courts by reason of their authority, to constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

mission's construction, this affords good reason to treat the Guidelines as expressing the will of Congress." 401 U.S. at 434. (Emphasis added.) In the case at bar, however, neither the facts, the language of the Act, nor its legislative history support the EEOC guideline. *Duke Power* does not advocate blind adherence to EEOC guidelines,¹³ but favors an analytical approach:

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment WHEN [not "because" as used in the EEOC guideline] the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. 401 U.S. at 431. (Emphasis added.)

Thus unless a citizenship requirement in employment results in national origin discrimination, there is no unlawful act. It has been overwhelmingly shown in this case that Farah's preference for United States citizens has not resulted in discrimination against Cecilia Espinoza on the basis of her Mexican national origin. Consequently, the Court of Appeals correctly rejected application of the EEOC guideline in this instance.¹⁴

13. The Court recognized the same limitation on the Department of Labor in *Skidmore v. Swift & Co.*, *supra*, where it held:

"The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Where the Administrator's interpretations have not comported with these factors, the courts have not hesitated to reject them. See, e.g., *Hodgson v. Generalized Servs., Inc.*, 457 F.2d 824 (4th Cir. 1972); *Lassiter v. Guy F. Atkinson Co.*, 176 F.2d 984 (9th Cir. 1949); *Wirtz v. Chesapeake Bay Frosted Foods Corp.*, 220 F.Supp. 586 (E.D. Va. 1963), *aff'd*, 336 F.2d 123 (4th Cir. 1964).

14. Espinoza filed her charge with the EEOC on August 11, 1969; the guideline in issue was not promulgated until January 13, 1970. In *Mitchell v. Hartford Steel Boiler Inspection & Ins. Co.*, 12 Wage & Hour Cas. 498, 501, 28 CCH Lab. Cas. ¶ 69,192

II.

The Court of Appeals decision does not in any way dilute the full complement of constitutional rights, privileges or guarantees enjoyed by aliens, including those embodied in the Fourteenth Amendment.

Graham v. Richardson, 403 U.S. 365, 372 (1971), clearly establishes that state classifications "based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Espinoza acknowledges that the state action cases, such as *Takahasi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) and *Graham*, involve state statutes which were found to violate the equal protection clause of the Fourteenth Amendment. The "judicial solicitude" of *Graham*, appropriate in state action cases to protect constitutional rights and guarantees, is one thing; but the judicial contortion required to equate "national origin" with "citizenship" in a statutory construction case is quite another. Even the *Graham* Court spoke of separate classifications based on alienage, nationality, and race. To speak of both alienage and nationality (or citizenship and national origin, if you will) would be redundant unless the words have different meanings. Although discrimination on the basis of both classifications could have been proscribed by Congress, the Act speaks only of national origin, not citizenship. Furthermore, the *Graham* court indicates an interpretation of "nationality" (or national origin) consistent with Farah's. When speaking of nationality classification, the Court cited cases all of which involve discrimination on the basis of *ancestry*, not citizenship, 403 U.S. at 371 n.5. In short, the Court

Footnote continued—

(D. Conn. 1955), *aff'd*, 235 F.2d 942 (2d Cir. 1956), *cert. denied*, 352 U.S. 941, the court accorded no weight whatsoever to an interpretation issued by the Department of Labor after the controversy that formed the basis of the litigation arose.

of Appeals decision is consistent with *Graham*, because it does not in any way dilute the full complement of constitutional rights, privileges or guarantees enjoyed by aliens, including those embodied in the Fourteenth Amendment.

CONCLUSION

Since Farah did not discriminate against Cecilia Espinoza because of any reason prohibited by Congress, the decision of the Court of Appeals is correct. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

KENNETH R. CARR

P. O. Box 9519

El Paso, Texas 79985

JACK T. CHAPMAN

WILLIAM DUNCAN

2000 State National Plaza

El Paso, Texas 79901

Counsel for Respondent

CERTIFICATE

I hereby certify that on November 29, 1972, copies of the foregoing were mailed, postage prepaid, to Harriet Rabb and George Cooper, 435 West 116th Street, New York, New York 10027, and to Ruben Montemayor, 1414 Tower Life Building, San Antonio, Texas 78205, Attorneys for Petitioners. I further certify that all parties required to be served have been served.

WILLIAM DUNCAN

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA AND RUDOLFO ESPINOZA, PETITIONERS

v.

FARAH MANUFACTURING Co., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

This memorandum is submitted in response to an order of this Court, entered on January 8, 1973, inviting the Solicitor General to file a brief expressing the views of the United States in this case.

The question presented is whether an employer's refusal to hire a lawful resident alien because that person is not a citizen of the United States constitutes employment discrimination on the basis of "national origin," in violation of Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2.

Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2 (a)(1), states in pertinent part:

(1)

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual * * * because of such individual's * * * national origin * * *.

Respondent Company is a manufacturer of clothing (Pet. App. 10a). Petitioner Cecilia Espinoza¹ is a lawfully admitted resident alien living in San Antonio, Texas, and is of Mexican ancestry (Pet. App. 2a). She applied for employment at the Company's San Antonio division in July 1969; the Company rejected her application on the basis of its long-standing policy, established by the Company's founder, that it would hire and employ only United States citizens (*ibid.*). Nevertheless, as the district court found, "persons of Mexican ancestry make up more than 92 percent of [the Company's] total employees, 96 percent of its San Antonio employees, and 97 percent of people doing the work for which [petitioner] applied * * *" (Pet App. 11a).

Petitioner then filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the Company had discriminated against her on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964 (Pet. App. 2a). The EEOC Regional Director found that petitioner had not been denied employment because she is Spanish surnamed, but authorized her to sue in federal court because "no administrative solution to the complaint was forthcoming" (*ibid.*).

¹ Hereinafter "petitioner."

The district court granted petitioner's motion for summary judgment, holding that the Company's refusal to hire her because she was not a United States citizen constituted discrimination on account of "national origin" within the meaning of Section 703(a) of the Act, 42 U.S.C. 2000e-2(a) (Pet. App. 10a-15a). The court relied in part on EEOC's Guideline, promulgated in January 1970,² which provides:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question. [29 C.F.R. 1606.1(d).]

The court of appeals reversed, finding that petitioner was "denied an opportunity for employment because she lacks United States citizenship, and for no other reason" (Pet. App. 3a) and that "[n]either the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress" (Pet. App. 5a). The court agreed, however, that "in many situations discrimination on the basis of citizenship would in-

² 35 Fed. Reg. 421 (January 13, 1970).

deed be banned by the Act, *e.g.*, where such a practice is symptomatic of or a necessary element within prohibited national origin discrimination, or where it is a mere pretense to camouflage national origin discrimination. In such situations we would find this [EEOC] regulation enforceable as a proper effectuation of the Act. However, no such situation exists here" (Pet. App. 6a). The court denied a petition for rehearing and for rehearing *en banc*.

DISCUSSION

By Executive Order since 1943³ and by Act of Congress since 1964,⁴ the federal government, as employer, has been prohibited from discriminating on the basis of "national origin." However, regulations of the Civil Service Commission have, since 1914, prohibited the employment of non-citizens in the federal competitive service.⁵ And in various appropriation Acts, Congress has forbidden the use of appropriated funds for the payment of non-citizen employees of the federal government.⁶

³ Exec. Order 9346, 8 Fed. Reg. 7183 (1943); Exec. Order 10308, 16 Fed. Reg. 12303 (1951); Exec. Order 10479, 18 Fed. Reg. 4899 (1953); Exec. Order 10925, 26 Fed. Reg. 1977 (1961); Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11478, 34 Fed. Reg. 12985 (1969).

⁴ 5 U.S.C. 7151, originally enacted as Section 701(b) of Title VII of the Civil Rights Act of 1964.

⁵ 5 C.F.R. 338.101.

⁶ See, *e.g.*, Public Works Appropriation Act, 1970, P.L. 91-144, Section 502, 83 Stat. 336-337; Treasury, Postal Service,

Thus, with respect to federal employment, the United States agrees with the interpretation of "national origin" by the court below since the federal government in its employment practices and Congress in appropriation Acts have construed the phrase to mean ancestry rather than citizenship.⁷ We recognize, as did the court of appeals (Pet. App. 6a), that in some instances a requirement of United States citizenship might well constitute a subterfuge for dis-

and General Government Appropriation Act, 1973, P.L. 92-351, Section 602, 86 Stat. 487.

These Civil Service Commission regulations and congressional appropriation Acts are currently under challenge as allegedly discriminating against aliens in violation of the Due Process Clause of the Fifth Amendment. See *Jalil v. Hampton*, No. 71-1574, certiorari denied, 409 U.S. 887 (the case has been remanded to the district court for an evidentiary hearing on this issue).

Currently before the Court is a case presenting the question of whether a State, as employer, is prohibited by the Equal Protection Clause of the Fourteenth Amendment from requiring United States citizenship as a prerequisite to employment. *Sugarman v. Dougall*, No. 71-1222, probable jurisdiction noted, 407 U.S. 908, argued January 8, 1973.

⁷ Congress presumably intended the phrase "national origin" to have the same meaning in Section 703(a)(1) of the 1964 Civil Rights Act, which is involved in this case, as in Section 701(b) of the same Act, which applied to the federal government as employer and which is now 5 U.S.C. 7151.

Apparently, the only legislative history regarding the meaning of "national origin" is the statement of Congressman Roosevelt, Chairman of the House Subcommittee reporting the bill, which the court below quoted (Pet. App. 4a):

"May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." [110 Cong. Rec. 2548-2549.]

crimination on the basis of national origin. If a citizenship requirement were used in such a manner, it would be contrary to the purpose of title VII—"to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees * * *." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430. And this would clearly entail the kind of discrimination forbidden by the Act, as interpreted in the EEOC Guideline referred to above.

But in the present case the record does not suggest that the Company was using the citizenship requirement as such a subterfuge since more than ninety percent of its employees are of Mexican origin. Therefore, this is not a case that presents the kind of practices that Title VII of the Act and the EEOC Guideline were intended to prevent.

In addition to the atypical factual situation presented here, which makes this a poor case to determine the validity of the EEOC Guideline and the interpretation of the Act it embodies, this is the first opinion by a court of appeals on this issue. There is thus no conflict in the circuits and the United States believes that other courts of appeals ought to be given the opportunity to consider the matter before this Court grants review, particularly since the employment practices of the federal government, which the Company relies upon, are currently undergoing judicial review, as we noted above, see p. 5, n. 6, *supra*, and

may be affected by this Court's decision in *Sugarman v. Dougall, supra*, n. 6.^a

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

J. STANLEY POTTINGER,
Assistant Attorney General.

MARCH 1973.

^a In light of these factors, the Equal Employment Opportunity Commission agrees that this is not an appropriate case in which to test the validity of its Guideline and that this Court should not undertake to review the question at this time. However, EEOC adheres to the view, expressed in its Guideline, that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin. While persons born in this country automatically obtain citizenship at birth, individuals born elsewhere can acquire citizenship only through a long and sometimes difficult process (see, e.g., 8 U.S.C. 1423, 1427(a), 1430). The Company's citizenship requirement thus creates two different and unequal standards for employment; the native-born are automatically eligible for employment while those born elsewhere are eligible for employment only after they have completed the required period of residency and passed the proficiency tests in English and civics. The Company's practice therefore discriminates against individuals on account of their place of birth and has the inevitable effect of placing persons who come from another country at a disadvantage.

**Supreme Court
of the
United States**

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,

FARAH MANUFACTURING CO., INC.,
Respondent.

BRIEF FOR PETITIONER

GEORGE COOPER
435 W. 116th St.
New York, N.Y. 10037
(212) 290-4291

RUBEN MONTEMAYOR
1414 Tower Life Bldg.
San Antonio, Texas 78205
Attorneys for Petitioners

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,

v.

FARAH MANUFACTURING CO., INC.,
Respondent.

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas, granting plaintiff's motion for summary judgment, is reported in 343 F.Supp. 1205, and appears in the Petition for Writ of Certiorari, at p. 10a. The opinion of the Fifth Circuit Court of Appeals and its denial of the petition for rehearing are reported in 462 F.2d 1331 and appear in the Petition for Writ of Certiorari, at p. 1a.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 31, 1972. Petitions for rehearing and for rehearing en banc were denied on July 21, 1972. On October 11, Mr. Justice Powell extended the time for filing a petition for certiorari to and including October 31, 1972. The Petition for Writ of Certiorari was filed on October 31, 1972. The writ was granted by order of the Court dated April 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The principle, federal statute to be construed is §703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) (1), which provides:

"It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

Other relevant statutory provisions are quoted in full in the text of the brief.

2. The regulation involved is an Equal Employment Opportunity Commission guideline on discrimination because of national origin, 29 C.F.R. §1606.1(d). This regulation provides:

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in the country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive Order of the President respecting the particular position or the particular premises in question."


QUESTION PRESENTED

Whether an employer's admitted policy of excluding resident aliens from employment constitutes a violation of the prohibition against discrimination on the basis of national origin contained in Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) and its statutory antecedents.

STATEMENT

This is an action brought by a lawfully admitted resident alien who was denied employment because she is not a United States citizen.

The Petitioner Mrs. Cecilia Espinoza lives in San Antonio, Texas with her husband, a United States citizen. Respondent Farah Manufacturing Co., is a clothing manufacturer. On or about July 19, 1967, the Petitioner ap-



plied for employment at Respondent's San Antonio plant. The Respondent refused to consider her application solely because she is not a United States citizen. It is Farah's policy to reject aliens "regardless of education, previous work experience or health qualifications." None of the above stated facts are disputed. Jt. App. 37, 49, 74-76, 79-80.

After filing a charge of discrimination with the Equal Employment Opportunity Commission and receiving a Notice of Right to Sue (29 C.F.R. §1601.25a(d)), Mrs. Espinoza brought this civil action. The Regional Director of the EEOC issued Findings of Fact indicating that the Respondent's policy has been to reject non-citizen applicants, that the policy is unwritten, that no reason was given for the existence of this policy, that an exception to the policy has been made on one occasion, that there is no national security justification for the policy and that Farah's refusal to hire Petitioner resulted from this policy. Jt. App. 28-30.

The District Court granted Petitioner's Motion for a Summary Judgment, holding that Respondent Farah Manufacturing Company's admitted policy of refusing to hire resident aliens constituted discrimination on the basis of national origin as prohibited by Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a). On appeal, the Court of Appeals for the Fifth Circuit reversed.

SUMMARY OF ARGUMENT

This case is of critical importance in determining whether a highly vulnerable minority, which has been the traditional object of employment discrimination, will be protected by Title VII. The group is resident aliens, who the Farah Manufacturing Company flatly refuses to hire regardless of individual qualifications or abilities.

Farah concedes that there is no business justification as such for its anti-alien policy, but claims that it is nonetheless outside the reach of Title VII because Title VII does not expressly cover discrimination on grounds of citizenship. Judged under the standards of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), however, it is clear that Farah's policy is barred by the provision in Title VII which prohibits discrimination on grounds of national origin.

First, Farah's policy imposes a special burden on persons of foreign birth. They, and they alone, must undergo the rigors of obtaining citizenship in order to qualify for employment. Native born persons are exempted from this burden by the fortuity of birth. It is a form of national origin discrimination to create special, non-job related, employment hurdles for persons merely because they are born abroad.

Second, the inevitable effect of Farah's policy is to prefer some ethnic groups over others. The groups preferred are those which have been in the country the longest and have become most thoroughly established in American society. For such established groups, the citizenship requirement has little significance. The groups bur-

dened are those with a significant number of new immigrants who have not yet fully moved into the mainstream. In San Antonio, of course, Spanish language groups, most notably Mexicans, are the primary objects of an anti-alien policy. They are also among the poorest and most vulnerable groups in the community.

An abundant body of law and precedent supports the conclusion that Title VII bars alienage discrimination. The Equal Employment Opportunity Commission's regulations expressly state that alienage discrimination is to be considered national origin discrimination under Title VII. 29 C.F.R. §1606.1(d).

Moreover, the long established Congressional policy dating back to reconstruction civil rights legislation, is to protect aliens against private employment discrimination. This reconstruction legislation is now embodied in 42 U.S.C. §1981. It has, since the 1968 Supreme Court decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, become established as a companion fair employment statute to Title VII, and it expressly protects against alienage discrimination. Title VII should also be construed to cover alienage discrimination for reasons of consistency and to offer maximum opportunity for complainants to avail themselves of the more fully articulated Title VII procedures. If Title VII is not so construed, petitioner should be granted the relief sought under the independent authority of §1981.

Recent decisions of this Court, particularly *Graham v. Richardson*, 403 U.S. 365 (1971), and Congressional immigration legislation provide further support for interpreting Title VII to bar alienage discrimination.

INTRODUCTION

The issue posed by this case is relatively simple and straightforward: yet it will have a major impact in determining whether a key minority group will be given the protection which Title VII offers. This minority group is resident aliens. The history of these aliens — Irish, Chinese, Italian, Jew and Mexican alike — has been a history of discrimination and in particular, job discrimination.

The warning "None need apply but Americans" in Boston newspapers of the mid-1800's¹ was not an isolated event in American history.

"For want of alternative, the immigrants [during the late 1800's] took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and miserable working conditions characteristic of the sweatshops and the homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all."

* * *

"Escape from the ranks of unskilled labor was, however, not easy and became steadily more difficult. The want of skill and capital was always a handicap. *But, in addition, discrimination against the newer ethnic groups grew even more intense, especially after the turn of the century.*"²

¹O. Handlin, *Boston's Immigrants* 62 (1959)

²O. Handlin, *The Newcomers* 24 (1959) (Emphasis added.)

This, then, was a continuing pattern in the treatment of aliens. The massive forty-two volume report of the 1911 Congressional Immigration Commission documents the occupational disadvantage of the foreign born,³ and the particularly bad situation of Mexican aliens.⁴ A 1928 survey of the employment practices in five large branches of industry revealed sweeping discrimination against aliens. Of two million positions surveyed, more than one million two hundred thousand were closed to aliens regardless of their qualifications.⁵ These findings were confirmed in a contemporaneous survey of 400 business leaders (members of President Hoover's Economic Commission) which showed an overwhelming preponderance of opinion favoring citizens as against aliens in industry and a common belief that the demand for citizenship was quite usual.⁶ Organized labor contributed to this situation. A survey of fifty labor unions revealed that unions with almost three-fourths of total union membership imposed a citizenship requirement.⁷ With the coming of the depression, aliens found their situation even worse; discrimination against them increased as the job market tightened.⁸ In the period of national defense production which followed, the situation intensified. Companies such as the Chrysler Corporation required citizenship statements as a condition of employment despite the fact that

³Report of the Immigration Commission, 61st Cong. 3d Sess., Sen. Doc. No. 747, at Vol XIX, p. 209, Table 74 (1911).

⁴Id at Vol. I.

⁵H. Fields, *Unemployment and the Alien*, 30 *South Atlantic Quarterly* 60, 62 (1931).

⁶Id. at 76.

⁷Id. at 68.

⁸H. Fields, *The Unemployed Foreign-Born*, 49 *Quarterly Journal of Economics* 533 (1935).

the law in most cases imposed no such requirement.⁹ The Bureau of Employment Security reported in January, 1941 that employers had generally gone far beyond legal requirements in limiting employment to citizens. The situation was especially bad in those areas with the largest concentration of aliens.¹⁰

This exploitation of and discrimination against aliens dissipated when their children, the second and succeeding native born generations, reached the employment market. The 1911 Immigration Commission Report documents the fact that for each occupational group the native born were paid more than were the foreign born.¹¹ Other studies have shown that the longer a person has been in the United States the higher will be his earnings.¹² By 1969, employment discrimination against the old ethnic groups had

⁹E. Rubin, *Unemployment of Aliens in the United States—1940*, at 21-21 (Unpublished Ph.D. dissertation on file at Columbia Univ. 1949).

¹⁰*Ibid.* Specific case studies paint an even more vivid picture of alien exploitation than is suggested by the gross statistics. The 1911 Immigration Commission Report and studies of scholars tell of the labor agencies which controlled immigrant labor. The story is one of exorbitant fees and commissions, extortion of bribes by foremen, calculated separation of men from their families, and cheating of the poor and uneducated even in little details such as charging transportation fees to a job when the transportation had been provided free. E. Abbott, *Immigration Select Documents and Case Records* 475-476 (1924). See G. Abbott, *The Chicago Employment Agency and the Immigrant Worker*, 14 *Am. J. of Soc.* 292 (1908).

¹¹Report of the Immigration Comm., *supra* note 4, at Vol. I, p. 394, Table 42, p. 401, Table 48.

¹²D. Cole, *Immigrant City* 121 (1963); R. Higgs, *Race, Skills & Earnings; American Immigrant in 1909*, 131 *J. of Econ. History* 420 (1971); A. Eckler & J. Zoltnick, *Immigration and the Labor Force*, 262 *Annals of Amer. Acad. of Pol. and Soc. Sci.* 92, 97-99, 101 (1949).

virtually ceased. The average earnings of all European ethnic groups was essentially the same.¹³ Not that any of this needs to be documented. The generally poor treatment of alien groups and the eventual assimilation of succeeding generations is a judicially noticeable fact of American history.

The practice at Farah Manufacturing Co. is a current manifestation of this established pattern. The company will not hire immigrants unless and until they become citizens. As the company puts it, they refuse to hire aliens "regardless of education, previous work experience, or health qualifications." Jt. App. 49. There is no business justification whatsoever for this blanket policy. The company has never in these proceedings attempted to justify the policy in any way, business or otherwise, or to show that it benefits anyone at all. Indeed the Fifth Circuit virtually conceded that the policy was arbitrary in terms of business needs.¹⁴ Farah's policy

¹³The median family income of persons as of November, 1969, self-classified by ethnic group, was as follows:

English	\$8,324	Polish	8,849
German	8,607	Russian	11,554
Irish	8,127	(predominately Jewish)	
Italian	8,808	Spanish	5,641

U.S. Bureau of the Census, Current Population Reports, Characteristics of the Population by Ethnic Origin, November, 1969, Series P-20, No. 221 (1971).

¹⁴"Quite obviously, a great host of arbitrary and discriminatory employment practices, far too numerous to mention, remain unchecked and unhampered by the Act. We hold that refusal to hire non-citizens is one of them." 462 F.2d at 1334.

¹⁵This concept of national origin goes beyond the usual practices of U.S. Bureau of the Census. The Census Bureau collects and reports data on "national origins" only for persons who are foreign born themselves or who have one or more foreign born parents, i.e., the first and second generations in the United States. See U.S. Bureau of the Census, U.S. Census of Population: 1970, Detailed Characteristics,

is plainly and simply an overt, arbitrary and wholly unjustified discrimination against aliens.

Nor does this case have anything to do with the employment of the so-called "commuter aliens" who are recruited from across the border for temporary employment. These commuters and their employment is specially regulated by the Department of Labor. The petitioner here is not a commuter. She is a lawfully admitted permanent resident alien. *Jt. App.* 74, 83. She is married to an American citizen and has expressed the desire to become a citizen herself when she can acquire the necessary language skills and education. *Jt. App.* 76, 77-78. Persons in her status are fully subject to all United States laws and taxes including the military draft.

Thus, the issue in this case comes down to this. Should Title VII, with its broad prohibitions against employment discrimination, including "national origin discrimination," be read to permit continuation of this arbitrary discrimination against a notoriously vulnerable and oppressed minority group? The Fifth Circuit interpreted the phrase "national origin" to cover only discrimination against entire ethnic groups, citizen and noncitizen alike, and, as such, it did not protect against alienage discrimination. That is the interpretation urged by respondent Farah

Texas, Series PC(1)-D45, at Table 141; U.S. Census of Population; 1960, Nativity and Parentage, Report PC(2)-1A (1965). By the time the third generation is reached, the concept of national origin is ignored for census purposes. In one special study (separate from the Decennial Census) conducted recently, the Census Bureau for the first time did examine ancestry dating back several generations, but this was reported as a study of "ethnic" origins, not "national" origins. See study cited in note 13, *supra*. Thus the Census Bureau draws a distinction between ethnic origin and national origin which the Fifth Circuit has blurred over.

here. But neither respondent Farah nor the court below could advance any reason other than a simple, one-sided reading of some rather ambiguous statutory words, why the statute should be so narrowly read, nor could they point to any clear legislative history calling for such a reading, or any statutory purpose or policy which would be served by such a reading. As we shall show, quite the contrary is true. All these factors, as well as the precedents established in related cases before this Court and Equal Employment Opportunity Commission guidelines, support an interpretation of the statute to protect aliens.

I

ALIENAGE DISCRIMINATION VIOLATES TITLE VII BECAUSE IT INVOLVES THE PURPOSEFUL IMPOSITION OF SPECIAL BURDENS ON PERSONS OF FOREIGN BIRTH.

The Fifth Circuit erred in limiting national origin to "ethnic," or "ancestry," discrimination. National origin discrimination includes that, of course, but it is entirely too narrow a reading of the statute to so restrict it. Title VII should rather be read to bar all forms of discrimination based on national origin. Alienage discrimination is simply another variation on the national origin discrimination theme and should be dealt with as such.

Because the Fifth Circuit interpretation of "national origin" looks to ancestry or ethnic background as the sole determinate of a person's national origin, all persons of Italian extraction are presumably "Italians" under this concept regardless of whether they themselves

were born in Italy or whether they had forbears who emigrated from Italy generations ago. Thus an employer who hires some members of this ethnic group may safely refuse to hire others without being accused of national origin discrimination. This concept of national origin takes an entirely unrealistic view of the nature of such discrimination. Blanket discrimination against all persons of a particular ancestry very rarely occurs. The employer who is prejudiced against Italians probably never considers visiting that prejudice upon an entirely assimilated American whose family has been here for generations, even though that person may technically be of Italian "national origin" under the Fifth Circuit interpretation. The simple fact of the matter is that a person's foreign origins become attenuated as he or she develops American roots. Only the foreign born have pure foreign origins; all succeeding generations have mixed foreign and American origins; and at some point the American origins predominate. That is the process of assimilation.

In order to avoid this definitional problem raised by the Fifth Circuit's restricted interpretation, a court must look to the place of an individual's birth, separately from and in addition to his ancestry, in assessing whether national origin discrimination exists. Any discrimination against those who have purely foreign origins and in favor of those who are partially American in origin is clearly the kind of discrimination against foreigners which is the essence of "national origin" discrimination. This reference to an individual's birthplace is consistent with the literal meaning of the phrase "national origin"; the *nation* where one is born is where he or she literally originated. Moreover, the nation of an individual's birth has much more to do with the likelihood of discrimination against

him than does the place from which his ancestors came years ago. As noted above, national origin discrimination has traditionally been the concern primarily of new immigrants — the foreign born — for these are the persons most obviously foreign in their name, language, dress and customs.¹⁶

Viewing national origin in terms of place of birth, there is no doubt that Farah's policy is prohibited. One group and only one — native born Americans — is unharmed by the Farah policy, since all persons in this group are citizens at birth. Persons born in any other nation are subjected to the very serious hurdle of having to become naturalized before they can gain employment. The only thing this burdened group has in common is foreign birth — foreign national origin. Thus, Farah's policy deliberately discriminates against persons of foreign birth as compared to persons of native American birth by imposing an extra burden on them. If an extra employment hurdle were erected for blacks or for Jews this Court would have no difficulty striking it down as a direct and intentional violation of Title VII. The situation should be no different when an extra burden is placed on the foreign born. The essential nature of the action is the same — a class discrimination against a group because of something beyond their control, their place of birth, without regard to individual merit or qualifications.

If the process of naturalization had some relevance to job performance the requirement might possibly be excused. But there is not the remotest relevance. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held certain test and diploma requirements to violate

¹⁶See pp. 7-10, *supra*.

Title VII because they operated as "built-in headwinds" impeding minority groups from obtaining employment and were unrelated to job capability. These tests and diploma requirements did not bar all Negroes, nor did they bar only Negroes, but their effect was unnecessarily to impede Negroes and other poorly educated groups in obtaining jobs. As the court put it:

"The Act [Title VII] proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431.

The same reasoning applies to the citizenship requirement imposed by Farah. Indeed, the citizenship requirement is much more offensive because native born Americans are de facto exempted from it by right of birth. The adverse effect is placed solely and exclusively on the foreign born. The citizenship requirement is therefore precisely

"the kind of 'artificial, arbitrary and unnecessary barrier to employment' which the Court [in Griggs] found to be the intention of Congress to remove." *McDonnell Douglas Corp. v. Green*, 41 U.S.L.W. 4651, at 4655 (May 15, 1973).

This broader approach to national origin, which takes account of an individual's own foreign birth as well as foreign ancestry is fully supported by the language and legislative history of Title VII. The statute does not

speak of "ethnic origins" or "ancestry", and thus is not on its face limited in the manner suggested by the Fifth Circuit. Nor is it anywhere so limited by committee reports or debate. The only significant definition of "national origin" in legislative history is a brief quote from Representative Roosevelt:

"May I just make very clear that "national origin" means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 Cong. Rec. 2548-49 (1964) as quoted by the court below in 462 F.2d at 1333.

The Fifth Circuit apparently laid great emphasis on the reference to "forebears" and concluded that ancestry was the key to national origin. But Representative Roosevelt talked much more about the place where "you" — the person himself rather than his forebears — came from. This of course calls for an examination of place of birth as well as ancestry. This tidbit of legislative history is not conclusive, of course. But to the extent it has any significance at all it supports a dual approach to national origin.

Title VII is a comprehensive attack on employment discrimination in the United States and that attack would be seriously undermined if any forms of arbitrary prejudice such as Farah's were permitted to persist and deny employment to persons who are fully qualified and able. This purpose is best served by a flexible interpretation of national origin which determines discrimination against persons on the basis of the nation where they originate as well as the nation where their forebears originate.

II

ALIENAGE DISCRIMINATION VIOLATES
TITLE VII BECAUSE ITS INEVITABLE EF-
FECT IS TO REDUCE JOB OPPORTUNITY
FOR RECENT IMMIGRANT GROUPS IN
GENERAL AND FOR SPANISH LANGUAGE
GROUPS IN PARTICULAR.

Even if this Court does not decide to define national origin in terms of birth in addition to ancestry, it should be clear that Farah's anti-alien policy is unlawful because of the adverse effect it has on recent immigrant groups in general and on Spanish language groups in particular.

The detrimental effect of a citizenship requirement does not fall equally on all ethnic groups. The citizenship requirement may be, like the requirements in *Griggs*, fair on its face and initially applied to all. But it clearly has the effect of preferring some ethnic and nationality groups over others. The groups preferred are those whose members have lived in the United States longest and who have become most thoroughly assimilated, because such groups will have a relatively small percentage of noncitizens among them. The groups burdened will be those with the heaviest percentage of new immigrants among them. This effect mirrors the traditional pattern of national origin discrimination in the United States—older more established nationality groups discriminating against newer groups.

Of course, a citizenship requirement does not bar employment to all members of any particular nationality,

and some of its adverse impact falls on persons who are members of nationality groups long established here, just as the requirements in *Griggs* were not perfect in excluding blacks and blacks alone. But the effect of a citizenship requirement in preferring established nationalities over new and more vulnerable nationalities is much more direct and obvious than was the effect of Duke's requirements in preferring whites over blacks.

The impact of the anti-alien policy in San Antonio illustrates its invidious nature. The only groups seriously affected by it are Spanish language groups. Of 23,102 resident aliens in the San Antonio area, 17,598 (77%) are Mexicans and another 625 (3%) are from other Spanish speaking nations and likely to be subjected to the same discrimination as Mexicans.¹⁷ In El Paso, where Farah's main office and plant are located, 85% of the alien population is Spanish speaking.¹⁸ No other alien nationality group in either city has more than 943 persons.¹⁹ The Spanish language aliens in San Antonio are 5% of the area's total Spanish language population.²⁰ The non-Spanish language aliens on the other hand constitute only 1% of the non-Spanish speaking population in the area.²¹ Thus, in practice the citizenship require-

¹⁷U.S. Bureau of the Census, U.S. Census of Population: 1970, Detailed Characteristics, Texas, Series PC-(1)-D45, at Table 144, p. 45-1306.

¹⁸Id. p. 45-1304.

¹⁹The next largest group is 943 United Kingdom nationals in San Antonio. Id. at p. 45-1306.

²⁰Id. at p. 45-1306; U.S. Bureau of the Census, Census of Population: 1970, Census Tracts, Final Report PHC(1)-186 San Antonio, Texas SMSA, at Table P-2, p. P-18 (1972).

²¹Ibid.

ment imposed by Farah is essentially a special burden on Spanish speaking groups which has little meaning to any other nationality group.

Not surprisingly, these Spanish language groups are among the poorest and most discriminated against in the nation as a whole and in San Antonio in particular. On a national basis the median income of families of Spanish ethnic background as of 1969 was only two-thirds of that of European ethnic groups.²² In the San Antonio area as of 1970, the mean household income of Spanish language groups was \$6,879 as compared to \$10,339 for non-Spanish white households.²³ Twenty-nine percent of all Spanish language families had incomes below the poverty line, while only 7% of the non-Spanish white families fell in this category.²⁴

Farah's anti-alien policy is having the same effect in San Antonio that such policies have always had. It is imposing a heavy burden on certain ethnic groups—who are the poorest and most vulnerable—while causing relatively little burden to other ethnic groups. This is surely a violation of the *Griggs* principle.

That is precisely the view which British courts have taken on the same issue. In *Borough of Ealing v. Race Relations Bd.*, (1971) 1 All E.R. 424 (Q.B. Div.), a local rule barring aliens from public housing was challenged as being in violation of the law banning discrimination on

²²See note 13, *supra*.

²³Data derived from U.S. Bureau of the Census, *supra* note 17, at Table 206, p. 45-2289.

²⁴Data derived from U.S. Bureau of the Census, *supra* note 17, at Table 207, pp. 45-2320, 45-2322.

grounds of national origin. The rule was defended with the same argument advanced by Farah here—that it discriminated on grounds of citizenship, not national origin. The Borough emphasized that when one of the complainants, who had both been Polish nationals, became naturalized he was promptly admitted to eligibility for housing, thus showing that it was not discriminating against Poles as a group. The court ruled, nonetheless, that national origin discrimination had been practiced.

“In my judgment the practical effect of the Borough’s rule is and must be to place . . . in a less favorable position than almost all people of British or Commonwealth origin, the vast majorities of people of other national origins. It is thus, in effect and is all except an insignificant number of cases, a discrimination on the ground of national origins although it is not expressed in those terms.” (1971) 1 All E.R. at 434.

Moreover, because a citizenship requirement is arbitrary and unjustified in terms of business needs, it can be arbitrarily waived if any “desirable” alien presents himself for employment. Precisely that has happened in Farah’s case. The company admits to having hired an alien, contrary to its professed strict policy, on at least one occasion. Jt. App. 29. It is, of course, a rare case in San Antonio or El Paso for a non-Mexican alien to present himself for employment to Farah, and so the “uniform” anti-alien policy can usually be applied uniformly. But as with any other policy having no business justification, it can be ignored whenever convenient. Farah’s manner of administering the policy lends itself to such exceptions. The policy is not in writing, Jt. App. 29, nor

is it officially published or publicized. Thus an exception can be made, say for a Canadian alien, without even the beneficiary realizing his favored treatment.

Because a citizenship requirement has this necessary and inevitable effect of imposing special burdens on the identifiable nationality groups who are most oppressed at the time, it should not be permitted unless it meets the *Griggs* test of business necessity. Petitioner does not argue that a citizenship requirement is per se unlawful, for in some rare instances there may be bona fide national security or related business needs for it which Title VII permits an employer to recognize. But, as the Court said in *Griggs*:

"Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." 401 U.S. at 432.

No such relationship has been shown or even suggested to exist here.

Rather than attempt to justify its arbitrary prejudice against aliens, Farah attempts to excuse it by the hiring of large numbers of citizens of Mexican extraction. Because its work force is better than 90% Mexican-American, Farah claims that it cannot be held to be discriminating against Mexicans. That point is fundamental to Farah's entire case. This claim, however, must be rejected for a multitude of reasons.

First, of course, the percentage of Mexican-Americans at Farah says nothing about other nationality groups from

Chinese to Haitian. Farah's policy works against them as well. There are, admittedly, probably very few non-Mexican aliens to apply at Farah's plant, but the discriminatory potential against them nonetheless exists, and Farah has introduced no evidence to demonstrate that it has not had an adverse impact or that it may not at some time in the future have such an impact.

Second, even as to Mexicans there is no showing that Farah's work force would not have had an even higher percentage of persons of Mexican ancestry if alienage discrimination were dropped. The nature of the work force in this area of Texas is such that a high concentration of persons of Mexican descent is almost inevitable in low skilled, low wage employment such as that at the Farah plant.²⁵ The work force is not yet 100% of Mexican extraction. So long as one more Mexican might have been hired without the anti-alien policy, as is entirely probable, the policy is having the forbidden discriminatory effect and should be struck down. This extreme application of the *Griggs* principle may not be appropriate in every case; but here we are dealing with a totally arbitrary and unjustified employment barrier, and even a de minimis discriminatory effect should not be tolerated.

Third, even if Farah could show that it had given sufficient positive preference to Mexican-American citizens to fully offset its exclusion of Mexican aliens, its policy would be legally unacceptable under Title VII. This

²⁵Newspaper accounts of Farah's employment practices have reported:

"El Paso [where Farah's main plant and office are located] is attractive to the apparel industry because of its enormous pool of cheap Mexican-American Labor."

"Classic Labor-Organizing Drive Splits El Paso," N.Y. Times, Sept. 11, 1972, at p. 57, col. 1.

is not the first case in which an employer before this Court has attempted to excuse discrimination against some members of a minority group by hiring large numbers of others of that group. In *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971), the Court was confronted with a sex discrimination situation very similar to the national origin discrimination situation here. The employer in *Phillips* refused to hire women with pre-school children, but claimed that he was pure in the eyes of the law because he generously hired other women. Indeed 75-80% of those hired in the position applied for by Mrs. Phillips were women. 400 U.S. at 543. This was the so-called "sex-plus" defense—that it was permissible to refuse to hire women with certain characteristics, so long as the employer compensated for that discrimination by hiring enough other women. A unanimous Court rejected this defense out of hand, ruling that "sex-plus" is discrimination nonetheless under Title VII. The national origin discrimination in this case should be treated just as stringently. The whole notion that Title VII permits an employer to pick and choose among members of a minority under arbitrary criteria and "make up" for discrimination against one subgroup by employing individuals from another subgroup is contrary to the fundamental goal of Title VII to bring about employment of each individual on his own merits. The idea that one discrimination can be offset by another—that two wrongs make a right—is not consistent with Title VII and must be rejected here, as it was in *Phillips*.

Fourth, even if Farah hired 100% Mexican-Americans its policy would have an unlawful effect as to that group because it singles out the Mexicans most vulnerable to national origin discrimination for exclusion. Persons of Mexican origin living in the United States range from

the totally assimilated who are virtually unidentifiable as such to the newest immigrant fresh across the border. As mentioned above, the likelihood of national origin discrimination and the vulnerability to its decreases as assimilation increases. Farah's policy has the nasty effect of operating against a group at the most vulnerable end of this spectrum. The attainment of citizenship is a rough indicator of assimilation. If a person is a citizen, either he is native born and been exposed to American schooling and culture from childhood, or he has become naturalized. The requirements for naturalization are in large measure tests of the degree to which a person has adapted to mainstream America. Knowledge is required of the English language, American history and American government.²⁶ Thus, by the time an individual has acquired citizenship, he has made significant progress on his way to being absorbed in American society and to that extent, on the way to being free of discrimination. Moreover, he has acquired tools, most notably language skills, needed to make his way in America. On the other hand, as the most recent and least assimilated of foreigners, aliens are most likely to be "different."

It is most unlikely that Congress meant to adopt a rule under Title VII which protected those members of an ethnic group who least needed it and left exposed those who most needed the protection. Yet that is precisely the interpretation that Farah is seeking. Farah's attempt to excuse its discrimination against alien Mexicans by hiring citizen Mexicans should not be accepted by this Court. Because of the invidious effect of this policy, it should be viewed as aggravating the unlawfulness of Farah's actions—certainly not as excusing them.

²⁶See 8 U.S.C. §1423; Annual Rep. Immigration and Naturalization Service 20-21 (1971).

III

**THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION (EEOC) GUIDELINES ON DIS-
CRIMINATION BECAUSE OF NATIONAL
ORIGIN EXPRESSLY DECLARE ALIENAGE
DISCRIMINATION TO VIOLATE TITLE VII.**

This Court has recognized that the EEOC is an agency whose interpretations of Title VII are entitled to "great deference" because of the obvious agency expertise in reading ambiguities so as to best carry out the purposes of the statute. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

Here, the EEOC's position is plainly expressed in its Guidelines on Discrimination Because of National Origin, 29 C.F.R. §1606.1(d) :

"Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g) to refuse to employ any person who does not fulfill the requirements imposed [under statutes or executive orders dealing with national security]."

Since there is no national security justification for Farah's anti-alien policy, it obviously violates the EEOC guideline. The Court of Appeals recognized that the EEOC position

was contrary to its decision, but decided to reject EEOC arguments. Such a rejection of agency views is appropriate only if the agency is plainly wrong. Yet the court below could cite no clear legislative history or other source of authority for holding that the EEOC position was not a reasonable interpretation of the law. On this ground alone, the Fifth Circuit decision was clearly wrong and contrary to the views of this Court as laid down in *Griggs v. Duke Power Co.*, *supra*. Petitioners will not burden the Court with a further elaboration of this point here, only because we understand that the EEOC position will be made known in an amicus brief to be filed by the United States.

IV

THE CONGRESSIONAL POLICY AGAINST PRIVATE EMPLOYMENT DISCRIMINATION BASED ON ALIENAGE IS LONG-STANDING AND ORIGINATED IN RECONSTRUCTION CIVIL RIGHTS LEGISLATION. THIS RECONSTRUCTION LEGISLATION, NOW EMBODIED IN 42 U.S.C. §1981, SHOULD BE DETERMINATIVE OF THE SCOPE OF TITLE VII AND, MOREOVER, PROVIDES AN ALTERNATIVE LEGAL GROUND FOR REVERSING THE COURT BELOW.

Title VII does not stand alone as a Federal legislative barrier to employment discrimination. It must be read and applied in conjunction with 42 U.S.C. §1981, originally enacted as part of the Civil Rights Act of 1866, as amended in 1870. Section 1981 provides that

"All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts . . . as is enjoyed by white citizens"

In order to understand the critical significance of §1981 to this case, it must first be made clear that §1981 bans private employment discrimination and that §1981 protects against discrimination based on alienage. Having established those points, we will then show that Title VII should reasonably be construed consistently with §1981. Even if Title VII is not so construed, the decision of the court below should nonetheless be reversed on the separate and independent authority of §1981.

A. SECTION 1981 BANS PRIVATE EMPLOYMENT DISCRIMINATION BASED ON ALIENAGE.

1. *Section 1981 applies to private employment discrimination.*

§1981 is a companion provision to 42 U.S.C. §1982, which protects minority rights to purchase and inherit property. Both provisions were originally enacted as part of a single statutory paragraph, §1 of the Civil Rights Act of 1866.²⁷ For many years this provision was thought

²⁷§1 of the Civil Rights Act of 1866 provided:

That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens. 14 Stat. 27 (1866).

to apply only to state action, *Hodges v. United States*, 203 U.S. 1 (1906), and, with this limitation both §1981 and §1982 lay relatively dormant. This status was abruptly changed by this Court's 1968 decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which exhaustively analyzed the legislative history of §1 of the 1866 Act and concluded that private, as well as state, action was covered by it.

It is true that *Jones v. Alfred H. Mayer Co.*, *supra*, involved §1982, the property rights provision, rather than §1981. But there can be no doubt that the *Jones* decision applies to §1981 as well as §1982. As stated above, both §1981 and §1982 were originally intertwined in the same provision, §1 of the Civil Rights Act of 1866. The legislative history of both provisions as initially enacted is therefore indistinguishable. Indeed, the opinion of the Court in *Jones*, *supra*, per Mr. Justice Stewart, makes repeated references to Congressional discussions of non-property rights, which are now §1981 rights, in support of its conclusion that §1982 property rights are protected against private action. See 392 U.S. at 427, 429-30, 432. The entire thrust of the *Jones* decision is to adopt the view of the sponsor of the 1866 Act, that it would "break down all discrimination between black men and white men." Cong. Globe, 39th Cong. 1st Sess. 599 1866, quoted with approval in 392 U.S. at 432. (Emphasis added in opinion of the Court.)

It is also clear from the legislative history of the 1866 Act and the *Jones* decision that employment rights were among those protected by §1981. The portion of the Act now contained in §1981 does not mention employment as such, but it guarantees equal rights "to make and enforce contracts." There is ample evidence that the employer-

employee relationship, perhaps the most common and important contractual relationship that the average person has, was included.²⁸

But the most telling evidence that §1981 protects against private employment discrimination after *Jones* lies in that decision's treatment of *Hodges v. United States*, 203 U.S. 1 (1906). *Hodges* was a case involving private employment discrimination and it had held that such private action was not covered by the 1866 Act. The Court in *Jones* noted that "the right to contract for employment [is] a right secured by 42 U.S.C. §1981," and proceeded to overrule *Hodges*.²⁹ This overruling of *Hodges*, a §1981 case, would hardly have been necessary or appropriate unless the Court recognized the determinative effect of its decision as to §1981.

The new status of §1981 as an equal employment adjunct to Title VII has become well established in the Courts of Appeals in the few years since *Jones*. The leading

²⁸As the *Jones* decision notes:

"The Congressional debates (over the 1866 Act) are replete with references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without the permission of their former masters . . ." 392 U.S. 407.

Typical of these references are the following remarks of Congressman Windom in the debate over §1 of the 1866 Act:

"Its object is to secure a poor, weak class of laborers the right to make contracts for their labor, the power to enforce payment of their wages, and the means of holding and enjoying the proceeds of their toil." Cong. Globe, 39th Cong. 1st Sess. 1159 (1866).

²⁹In *Hodges* a group of white men had terrorized Negroes to prevent them from working in a sawmill. To quote from the *Jones* court's description of the case:

"The terrorizers were convicted . . . of conspiring to prevent the Negroes from exercising the right to contract for employment, a right secured by 42 U.S.C. §1981." 392 U.S. at 442-43, n. 78.

case is *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970), where private union discrimination against blacks was held to violate §1981, both on the authority of *Jones* and on the Court of Appeals' own review of legislative history. The court concluded that:

"Every indicia of Congressional intent points to the conclusion that §1981 was designed to prohibit private job discrimination." 427 F.2d at 483.

The same conclusion has been reached by the five other Courts of Appeals, all those that have considered the question.³⁰

³⁰*Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1087 (5th Cir. 1970), cert. denied. 401 U.S. 948 (1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), cert. denied. 405 U.S. 916 (1972); *Young v. International Tel. and Tel. Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brady v. Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1379 (5th Cir. 1972); *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1204 n.2 (2d Cir. 1972) (dictum). There are no conflicting Court of Appeals decisions. Also in accord are *Dobbins v. Electrical Workers Local 212, IBEW*, 292 F.Supp. 413 (D. Ohio 1968) in the Sixth Circuit and *League of Academic Women v. Regents of the University of California*, 4 E.P.D. ¶7878 (N.D. Calif. 1972) (dictum) in the Ninth Circuit.

Other useful District Court analysis reaching the same conclusion is set out in *Pennsylvania v. Operating Engineers, Local 542*, 5 E.P.D. ¶8004, at 6688-6689 (E.D. Pa. 1972); *Sidberry v. Stage Employees, IATSE, Local 307*, 5 E.P.D. ¶7976 (E.D. Pa. 1972); *Cofield, v. Goldman, Sachs & Co.*, 5 E.P.D. ¶8492 (S.D.N.Y. 1972); *Tolbert v. Daniel Cons. Co.*, 4 E.P.D. ¶5108 (D.S.C. 1971); *Johnson v. Goodyear Tire & Rubber Co.*, 5 E.P.D. ¶8056 at 6854-55, 6858 (S.D. Tex. 1972); *Tramble v. Converters Ink Co.*, 4 E.P.D. ¶7873 (N.D. Ill. 1972); *Page v. Curtiss-Wright Corp.*, 4 E.P.D. ¶7564 (D.N.J. 1971). The only unreversed District Court opinion to the contrary is *Smith v. North American Rockwell Corp.* 50 F.R.D. 515 (D. Okla. 1970). See generally, R. Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 *Harvard Civil Rights-Civil Liberties L. Rev.* 57 (1972).

2. *Section 1981 protects against discrimination based on alienage.*

The plain language of §1981—“*All persons shall have the same rights to make and enforce contracts . . . as white citizens . . .*”—rather obviously indicates a purpose, among others, to assure that noncitizens, *i.e.*, aliens, will receive the same treatment as citizens. The legislative history of the provision thoroughly confirms what the plain language indicates.

When originally enacted in §1 of the Civil Rights Act of 1866, §1981 differed from the present law in that the 1866 Act, quoted at note 27, *supra*, protected only “persons born in the United States and not subject to any foreign power,” and thus expressly excluded aliens. This coverage was sharply modified by civil rights amendments of 1870. The 1870 amendments reenacted and reaffirmed the 1866 Act, but they also modified a portion of it to extend partial protection to “all persons within the jurisdiction of the United States,” which is the coverage of the present §1981. The purpose of this modification was explained by its sponsor, Senator Stewart, when he first introduced an earlier version of the 1870 Amendments.

“The original civil rights bill protected all persons born in the United States in the equal protection of the laws. This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of our laws. It extends the operation of the civil rights bill, which is well known in the Senate and to the country, to all persons within the jurisdiction of the United States. That is all there is in the bill.” Cong. Globe, 41st Cong., 2d Sess. 1536 (1870).

The 1870 amendment was not comprehensive in extending the 1866 Act to aliens. As Senator Stewart went on to explain:

"It has nothing to do with property or descent. We left that part of the law out; but it gives protection to life and property here. The civil rights bill, then will give the United States Courts jurisdiction to enforce it." *Ibid.*

The full text of the sections 16-18 of the 1870 amendments are set out in the margin.³¹ As Senator Stewart indicated,

³¹"Sec. 16. AND BE IT FURTHER ENACTED, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.

"Sec. 17. AND BE IT FURTHER ENACTED, That any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

"Sec. 18. AND BE IT FURTHER ENACTED, that the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act."

the rights to hold and inherit property contained in §1 of the 1866 Act are not included and therefore were not extended to aliens. But the right of importance to this case, the right "to make and enforce contracts" is clearly included.³²

This dichotomy in the treatment of employment rights as distinguished from property rights in the 1870 amendments can easily be understood in light of traditional common law attitudes. The rights of aliens to hold property were traditionally fettered.³³ As recently as 1923 this Court upheld a state law denying aliens the right to hold any interest in real property, even a leasehold. *Terrace v. Thompson*, 263 U.S. 197 (1923). In so doing the *Terrace* decision drew a distinction between an alien's "right to work for a living in the common occupations of the community," which admittedly was protected by the Fourteenth Amendment, and the right to own real property, which was relatively unprotected, a distinction remarkably similar to that in the 1870 amendments.³⁴

³²This distinction in the treatment of aliens between property rights and other rights has been carried forward to the present day. The separation of §1 of the 1866 Act into §§1981 and 1982 stems from a statutory codification undertaken during 1866 to 1873. See 14 Stat. 74 (1866); 18 Stat. 113 (1874). The codifiers, who must have been well aware of the civil rights legislation being enacted contemporaneously with their labors split §1 of the 1866 Act into R.S. 1977 (now §1981) and R.S. 1978 (now §1982). The former provision applying to non-property rights protects "all persons," while the property rights protection of the latter applies only to "citizens."

³³See *Phillips v. Moore*, 100 U.S. 208, 212 (1879).

³⁴The real property right at issue in *Terrace* was a proposed leasehold of farmland to an alien Japanese farmer. After acknowledging the protected status of the right to work for a living, the Court ruled that the right was not controlling:

"In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupa-

Similar strong feelings regarding property were undoubtedly prevalent a half century earlier when the 1870 amendments were enacted, and just as Mr. Justice Butler in *Terrace* could find that the right to work was protected by the Fourteenth Amendment more than the right to own real estate, so the Congressmen in office when the Fourteenth Amendment and related civil rights acts were enacted could share a similar feeling.

The significance of §1981 as a protector of the employment rights of aliens has long been recognized by this Court. Thus in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), §1981 was relied upon in striking down laws used to deny Chinese persons the right to operate laundries. And in *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420 (1948), the Court expressly relied upon §1981 in striking down state laws restricting fishing rights of aliens. See *Truax v. Raich*, 239 U.S. 33, 39 (1915). As might be expected, prior to *Jones v. Mayer*, *supra*, only state action was challenged under §1981. But subsequent to *Jones*, lower Federal courts have begun applying §1981 to protect the private employment rights of aliens. The most important such opinion is that of Judge Singleton in *Guerra v. Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972), where the court thoroughly and extensively analyzed the legislative history of the 1866 and 1870 Acts before holding that §1981 barred private union discrimination against aliens. See *League of Academic Women v. Regents of the Univ. of Calif.*, 4 E.P.D. ¶7878 (N.D. Calif 1972).

tions of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within the borders are matters of highest importance and affect the safety and power of the State itself." 263 U.S. at 197.

**B. TITLE VII SHOULD BE INTERPRETED
TO PROTECT THOSE EMPLOYMENT
RIGHTS PROTECTED BY §1981.**

This discussion of §1981 is of primary importance here in demonstrating the longstanding Congressional solicitude for the employment rights of aliens and the policy against employment discrimination based on alienage. It confirms that aliens are a traditionally protected group under antidiscrimination legislation. And it strongly argues for an interpretation of Title VII that would be in keeping with this longstanding tradition.

"Statutory interpretation requires more than concentration upon isolated words; rather consideration must be given to the total corpus of pertinent law . . ." *Boys Mkts. Inc. v. Retail Clerks Union*, 398 U.S. 235, 250 (1970).

The trend of decisions in this Court over the past several decades indicates a growing awareness of the vulnerability of aliens and their need for civil rights protection. Compare *Heim v. McCall*, 239 U.S. 175 (1915), with *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948), with *Graham v. Richardson*, 403 U.S. 365 (1971). It should not be assumed that Congress in 1964 meant to move in the opposite direction and enact civil rights legislation less protective of aliens' rights than the 1870 Act.

Furthermore, given the existence of §1981 as a federal law barring alienage discrimination, the issue regarding Title VII becomes not whether aliens will be protected but rather how they will be protected; that is, will victims of alienage discrimination such as Mrs. Espinoza be able

to take advantage of the conciliation procedures of the Equal Employment Opportunity Commission and the other fully articulated administrative procedures of Title VII, or will they be forced to commence private actions in Federal court under §1981 in every case. There is no benefit to anyone—employer, employee, government or the public at large—in forcing an aggrieved employee to pursue a §1981 remedy, except the interest of an employer in depriving the employee, who will ordinarily not be able to afford private counsel, of the assistance of the Equal Employment Opportunity Commission in prosecuting his or her claim. That employer interest is hardly worthy of judicial protection. The overall pattern of equal employment protective legislation calls for an interpretation of Title VII to give it coverage consistent with §1981 so that Title VII and the procedures established under it may be most effectively put to use.

C. SECTION 1981 PROVIDES AN ALTERNATIVE BASIS FOR REVERSING THE COURT OF APPEALS AND REINSTATING THE RELIEF ORDERED BY THE DISTRICT COURT.

If, however, Title VII is construed not to cover alienage discrimination, then §1981 takes on a different significance for this case. It provides an independent basis for reversing the Fifth Circuit and reinstating the relief ordered by the District Court, since respondent Farah's alienage discrimination clearly violates §1981.

The petitioner does not seek primary relief under §1981 because her rights under it may be to some extent be

dependent upon the interpretation given Title VII by this Court. While all Courts of Appeals to consider the question have explicitly ruled that §1981 establishes a right of action against private employment discrimination, see p. 30 *supra*, the courts are divided as to the relative priority of that right and the Title VII right where the two overlap. Some courts have held that §1981 is available only when there is a good reason for bypassing Title VII, *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.) *cert. denied*, 400 U.S. 911 (1970), and others have held that §1981 is always available. *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972).³⁵ Petitioners have not raised that issue and do not seek to have it resolved in this case. If there is an overlap between Title VII and §1981 as to alienage discrimination — and petitioners of course strongly argue that there is — petitioners seek only Title VII relief. But if this Court should find that there is no overlap, because Title VII does not cover alienage discrimination, then petitioners' right to relief under §1981 becomes paramount and she becomes entitled to it no matter which Court of Appeals view of §1981 is adopted. Therefore, while petitioner does not urge §1981 as a primary basis for relief, she does ask that her §1981 rights be recognized to a sufficient extent to protect her in the event that her Title VII claim is rejected.

³⁵The precise relationship between §1982 and the fair housing provisions of the Civil Rights Act of 1968 are similarly not yet fully resolved. See *Tillman v. Wheaton-Haven Recreation Assoc.*, 93 Sup. Ct. 1090 (1973).

IV.

THE FIFTH CIRCUIT DECISION IS INCONSISTENT WITH CONTEMPORARY PUBLIC POLICY TO PROTECT ALIENS EXPRESSED BOTH IN DECISIONS OF THIS COURT AND IN FEDERAL LEGISLATION.

A. RECENT SUPREME COURT DECISIONS

Supreme Court decisions in *Takahashi v. Fish and Game Comm.*, 334 U.S. 410 (1948) and *Graham v. Richardson*, 430 U.S. 365 (1971) have established that classifications based on alienage are inherently suspect and subject to special judicial scrutiny. Writing for the Court in *Graham*, Mr. Justice Blackmun emphasized that

"Aliens as a class are a prime example of a 'discrete and insular minority . . . for whom . . . heightened judicial solicitude is appropriate.'" 403 U.S. at 372.

This principle had not been stated so forcefully before, but as noted above, it had long been followed by the Court insofar as the employment rights of aliens are concerned.³⁶ The earliest major case involving alien discrimination is the oft cited *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). That decision laid the foundation of the doctrine later enunciated in *Truax v. Raich*, 239 U.S. 33, 41 (1915), that the right to work in common occupations is "the very essence" of the freedom guaranteed by the Fourteenth Amendment and that aliens are fully entitled to be protected in exercising that important right.

³⁶See p. 34, *supra*.

To the extent that *Graham* and its predecessors are based on the Fourteenth Amendment they are not binding as to Title VII, but it should be obvious that the same considerations which underlie the Court's definition of suspect classes under the Constitution also apply to Congress' definition of protected classes under Title VII. Race is the basic protected class in both instances, and in both instances other groups with similar vulnerability have also been brought in. While exact parallels between the scope of the Fourteenth Amendment and Title VII are not to be expected, certainly the "judicial solicitude" which supported the *Graham* decision ought not be transformed into judicial harshness when the courts turn to Title VII, which is the private employment analog of the Fourteenth Amendment. But the Fifth Circuit decision is plainly as insouciant of the interests of aliens as it can be. Petitioners here ask only that an ambiguity in a statutory provision (the phrase "national origin" in Title VII) be construed so as to be protective of aliens, and that construction has been amply justified in terms of the language and purpose of the Act and its legislative history. If the policy and attitudes supporting *Graham* are given any sway at all in interpreting Title VII, discrimination against aliens would surely be viewed as a form of forbidden national origin discrimination.

Moreover, this line of Fourteenth Amendment decisions has direct relevance to petitioners rights under 42 U.S.C. §1981.¹⁷ The civil rights amendments of 1870, from which §1981 was in part derived, were enacted shortly after the Fourteenth Amendment became law and are recognized as as an aspect of legislative implementation of that

¹⁷See pp. 26-37, *supra*.

amendment.³⁸ The growing recognition of aliens as a protected class under the Fourteenth Amendment gives added weight to petitioners claim that §1981 should be interpreted to protect her private employment rights, if there were any doubt as to that.³⁹

B. FEDERAL IMMIGRATION LEGISLATION

The other Federal legislation most directly affected by the decision in this case is the immigration laws. These laws, as amended in 1965, express a clear concern with assuring the employability of aliens. "Aliens who are paupers, professional beggars, or vagrants" are excluded from admission to the United States (8 U.S.C. §1182(a)(4)), as are aliens who are likely to become public charges.

(8 U.S.C. §1182(a)(15)). Aliens are to be deported who have "within five years of entry become a public charge from causes not affirmatively shown to have arisen after entry (8 U.S.C. §1251(a)(8)), and an alien likely to become a public charge may be admitted only upon the posting of a bond (8 U.S.C. §1183). Most importantly, 8 U.S.C. §1182(a)(14) excludes aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor unless the Secretary of Labor has determined that (a) there are not sufficient workers in the United States at the appropriate time and place who are "able, willing, qualified and available" to perform such labor and that

³⁸See *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 482 (7th Cir.), cert. denied, 400 U.S. 911 (1970).

³⁹Of course, constitutional authority for Congressional protection of aliens need not be based on the Fourteenth Amendment alone. The plenary Federal power over immigration gives Congressional ample authority to support any legislation related to aliens and their treatment. See *Graham v. Richardson*, 403 U.S. at 376-380.

(b) "the employment of such aliens will not adversely effect the wages and working conditions of the workers in the United States similarly employed" The conclusion is inescapable that aliens who are admitted into the United States are expected to be employed.

This Court, in *Graham v. Richardson*, 403 U.S. 365, 376-380 (1971), recognized that the indirect, but very real, relationship between Federal immigration policy and the administration of welfare programs required that state welfare officers not impose any special restraints on aliens. Thus immigration legislation, which said nothing on its face about welfare, was read to indicate a Congressional intent to bar state laws which might harm aliens in a way inconsistent with immigration policy.

Congressional immigration policy should also be read to indicate a Congressional intent to bar private actions which would frustrate immigration policy even more directly than the state laws in *Graham*. The legal doctrines involved are, of course, different. The state laws in *Graham* were invalidated because they conflicted with Congressional policy. In this case rather, the immigration policy must be read as an indicator of the Congressional policy underlying Title VII. Nonetheless, the basic principle is the same. The Congressional immigration policy should always be taken account of when laws impinging upon it are construed, and, to the extent possible those laws should be construed in accord with immigration policy. Here that objective can easily be achieved by reading Title VII to bar alienage discrimination. To rule otherwise, would needlessly undercut the objective of having aliens employed.

C. FEDERAL CIVIL SERVICE LEGISLATION

The one area of Federal law which suggests an unfavorable Congressional attitude toward the employment of aliens is that covering the Federal civil service. For many years, regulations of the United States Civil Service Commission have imposed a barrier to the employment of noncitizens.⁴⁰ This rule was originally adopted without Congressional authorization, but at some subsequent time Congress gave support to the Commission's policy in an odd way. No affirmative legislation was enacted to support this discrimination against aliens. Rather, for some years a single appropriations bill each year has contained a provision similar to the following:

"During the current fiscal year no part of any appropriation contained in this *or any other bill* shall be used to pay the compensation of any officer or employee of the Government of the United States . . . unless such person (1) is a citizen of the United States [or falls within enumerated categories of exceptions]." P.L. 91-439, §502, 84 Stat. 902 (1970) (Emphasis added.)

Respondent Farah, both in its briefs below and in its opposition to certiorari laid great emphasis on these provisions as demonstrating Congressional intent to permit alienage discrimination. However, it is unreasonable for many reasons to attribute any great significance to these provisions in determining Congressional intent.

These provisions are adopted in a fashion which assures the minimum possible legislative attention or con-

⁴⁰5 C.F.R. §338.101 (1973).

sideration. They do not appear in affirmative legislation but rather as a technical provision buried at the back of an appropriations bill. The provision does not appear in every appropriations bill, but only in one such bill each year.

Moreover, the Congressional provision is nowhere near as sweeping or rigid as Farah's policy. The provision excepts all of the following:

- (1) persons who "owe allegiance to the United States"
- (2) resident aliens from Poland or the Baltic countries
- (3) "citizens of the Philippines," and
- (4) "nationals of those countries allied with the United States in the current defense effort."

Other statutory provisions grant additional broad exceptions. For example, the entire Department of Defense has been exempted from this restriction. P.L. 92-204, §703, 85 Stat. 726 (1971). See P.L. 91-382, Administrative Provisions, 84 Stat. 823 (1970) partial exemption for Library of Congress).

If this provision, with its incredible potpourri of exceptions, were presented for open Congressional debate and consideration, we can only speculate upon the outcome. But that is not the issue here. The only question here is whether the provisions should be taken to reflect Congressional intent under Title VII. It would be an absurd distortion of legislative history to give such significant effect to this odd bit of backdoor legislation.

In any event, there are justifications for restricting alien employment in government which are wholly inap-

plicable to private employment. A combination of loyalty considerations and the traditional political interest in preserving the government payroll for constituents (aliens as nonvoters are, of course, the only non-constituents in America) provides an explanation for these restraints on public employment. *Wong v. Hampton*, 333 F.Supp. 527 (N.D. Calif. 1971). Such justifications are of very doubtful constitutional validity and the civil service restrictions are now under constitutional attack. See, *Jalil v. Hampton*, 460 F.2d 923 (D.C. Cir. 1972), *cert. denied*, 93 Sup. Ct. 112 (1972); *Faruki v. Rogers*, 5 E.P.D. ¶8015 (D.C. Cir. 1972). Whatever the outcome of that attack, it should be clear that the rationale behind civil service restrictions has no relevance to private employment and there is no reason to assume that Congressional action affecting the private sector was intended to be similarly restrained.

CONCLUSION

For the reasons indicated, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for the granting of appropriate relief.

GEORGE COOPER
435 W. 116th St.
New York, N.Y. 10027
(212) 280-4291

RUBEN MONTEMAYOR
1414 Tower Life Bldg.
San Antonio, Texas 78205

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing Brief of Appellee was served by mail upon Kenneth R. Carr, Esq., P.O. Box 9519, El Paso, Texas 79985, this ____ day of June, 1973.

George Cooper

FILE COPY

Supreme Court, U. S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Petitioners,

—v.—

FARAH MANUFACTURING Co., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, *AMICUS CURIAE***

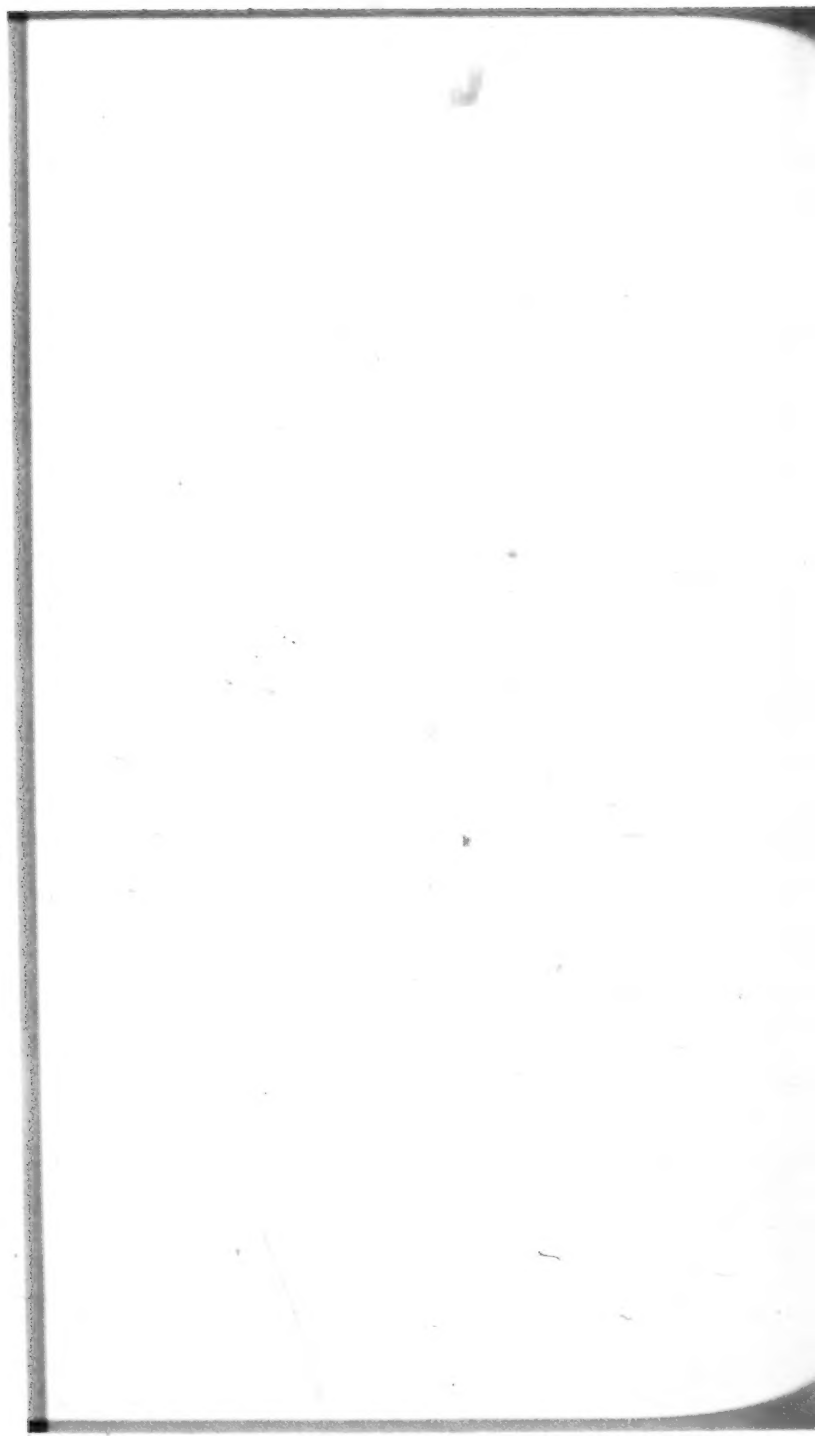
MARIO G. OBLEDO
SANFORD JAY ROSEN

*Mexican American Legal Defense
and Educational Fund, Inc.*

145 Ninth Street

San Francisco, California 94103

Attorneys for Amicus Curiae



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FOR THE FIFTH CIRCUIT

**BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, *AMICUS CURIAE***

Interest of *Amicus**

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to provide legal assistance to Mexican-Americans. It is headquartered in San Francisco with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C.

* The letters of Petitioner and Respondent, consenting to the filing of this brief *amicus curiae* out of time, have been filed with the clerk.

The term "Chicano" is a shortened version or corruption of the term "Mexicano". The term has often been applied broadly and loosely to Mexican-Americans in the Southwest. This group includes recent immigrants to the United States as well as people whose connection with the United States goes back a number of generations. Many Mexican-Americans are United States citizens. Many others are not. A significant part of this group includes persons "lawfully admitted for permanent residence," the status that is one step before citizenship.

Courts have recognized that Mexican-Americans constitute a separate group, often subject to distinct discrimination in today's society. E.g., *Hernandez v. Texas*, 347 U.S. 475 (1954). Quite recently a federal district court surveyed the situation as regards the Mexican-American in Texas.

Because of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others.

Graves v. Barnes, 343 F. Supp. 704, 728 (three-judge court) (W.D. Texas 1972), *aff'd sub nom. White v. Regester*, 41 U.S.L. Week 4885 (June 18, 1973). See also, *Keyes v. School District No. 1, Denver, Colorado*, 41 U.S.L. Week 5002 (June 21, 1973).

There are approximately ten million Mexican-Americans, making them one of the largest as well as one of the most discriminated against groups in the United States. They are also one of the most powerless in the political arena. A significant reason for this powerlessness is the fact that many persons of Mexican origin who lawfully reside in the United States are not citizens and are thus excluded from the franchise. Mexicans who are permanent resident aliens make important contributions to American life and assume fundamental duties toward the United States (such as paying taxes and serving in the armed forces), but are unable to use the electoral process to advance their interests. MALDEF thus sees as one of its roles the effective use of the courts to safeguard and secure the legal rights of persons of Mexican origin who are permanent resident aliens.

Question Presented

Whether refusal to hire a permanent resident alien actually residing in the United States solely on the basis of alienage is unlawful under Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §1981.

Statement of the Case

It is important to consider the exact scope of the facts and issues in this case. On July 19, 1969, Cecilia Espinoza was denied employment by Farah Manufacturing Company because she was not a United States citizen. Cecilia Espinoza is a permanent resident alien actually residing in the United States. She is married to Rudolfo Espinoza, also a plaintiff in this case, who is an American citizen. They have a four year old daughter. Cecilia Espinoza has ex-

pressed the desire to become a citizen herself when she can acquire the necessary language skills and education. App. pp. 77-78.

No one for a moment suggests that Title VII or any federal regulation or statute compels Farah to employ any alien who is not legally in this country. See 29 C.F.R. §1606.1(d) (applicable Equal Employment Opportunity Commission regulation); Brief of Petitioners at p. 11. Similarly Farah is not being asked to employ any alien if to do so would violate any valid Immigration and Naturalization Service or Department of Labor policy concerning aliens. Furthermore, a decision in this case need have no application to the problem of "seasonal commuter aliens," agricultural workers whose legal status within this country has been put in doubt by the recent case of *Bustos v. Mitchell*, 41 U.S.L. Week 2573 (D.C. Cir. April 16, 1973). The instant case also has no relevance to the situation of the "daily commuter aliens" (see *Bustos v. Mitchell, supra*), who, by means of an Alien Registration Receipt Card (Form I-151, the "green card"), commute daily over the border to work in the United States while actually living in Mexico (or Canada).

Refusal to hire permanent resident aliens actually residing in the United States (persons in Cecilia Espinoza's position) constitutes national origin discrimination. Refusal to hire alien commuters (or even American citizens commuting from their homes in Mexico), on the other hand, does not automatically constitute national origin discrimination as such a refusal could be wholly based on residence. Actual residence within the United States could be a bona fide occupational qualification, within the meaning of Title VII, for Farah employees. Since there is always the possibility

of restriction and delay involved in the crossing of international boundaries, Farah might well demonstrate that effective plant operation requires reliability of personnel which foreign residence could jeopardize. Point might be given to such a demonstration by certain activities not too long ago along the United States-Mexican border. The Bureau of Customs and the Immigration and Naturalization Service cooperated to seal the border to narcotics traffic. Delays in border crossings of up to four hours were reported. F. Belair, *Operation Intercept: Success on Land, Futility in the Air*, N.Y. Times, p. 43, Oct. 2, 1969.

In the instant case, however, no bona fide occupational qualification exists to justify refusal to hire permanent resident aliens actually residing in the United States. Indeed since the inception of the original cause of action in 1969 Farah has not even attempted to offer any business reason for its policy. Since its policy is arbitrary and since it operates to discriminate on the basis of national origin, it is unlawful.

ARGUMENT

MALDEF is in accord with the arguments presented in the Brief for Petitioners. It offers the following argument only in amplification of points made by the petitioners.

Farah has made much of the fact that 95% of its employees are Spanish-surnamed. Like the Fifth Circuit it makes the too quick identification of ethnic discrimination with national origin discrimination. What must be remembered, however, is that national origin discrimination has never been a phenomenon distributed evenly over an entire ethnic group. The "national origin" discrimination

one suffers naturally decreases the further in years and generations one is removed from foreign origins. The acquiring of United States citizenship, the increased familiarity with the language, customs, and mode of life of one's new home increase the assimilation process. It is unrealistic to expect a third generation American citizen and a newly arrived immigrant to be subject to similar discrimination because their last names are both Rivera. A law that could be satisfied with a list of employees' last names would be similarly unrealistic. It must be assumed that the drafters of Title VII were aware of the true nature of the "national origin discrimination" problem, and it should be interpreted to meet it.

Farah's discrimination comes into play only for the foreign born. If the discrimination was based solely on place of birth, it would clearly be national origin discrimination regardless of the number of Spanish surnamed employees Farah has. By basing the discrimination on citizenship, Farah has merely substituted another element in the classification. This additional element further disadvantages that class of persons most victimized by "national origin" discrimination, i.e., recent immigrants, and those least assimilated into mainstream American life. It is hard to see how this additional discriminatory element operates to nullify the "national origin" discrimination which is the net effect of Farah's policy.

The Equal Employment Opportunity Commission correctly concluded that "... discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin . . ." Hence it has ruled that "a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of

his citizenship . . . " 29 C.F.R. §1606.1(d). The EEOC regulation represents the most realistic approach, consistent with the broad ameliorative mandate of Title VII. Farah's argument that the regulation is valid in those instances when citizenship based discrimination is combined with or substituted for a clear-cut total discrimination against a particular ethnic group hides the real issue.

Nor can it be said that EEOC policy has been confused or contradictory on this matter. At pages 9 and 10 of their brief in the Fifth Circuit, Farah cites an EEOC General Counsel opinion in which it is stated that employment discrimination against non-resident aliens does not violate Title VII. They then analogize that case to the present one.

Researchers will discover that neither the opinion nor any reference to it are to be found in the *Employment Practices Guide*. In the periodic revision which the *Guide* undergoes all reference to the opinion was removed and discarded. *Amicus* has succeeded in obtaining directly from Farah's attorney and from the publisher of the *Guide* the material cited. A copy is appended to this brief, at pp. 11-15.

The material proves to be an Opinion Letter of the Acting General Counsel of the EEOC, released April 28, 1967, and issued pursuant to 29 C.F.R. §1601.30(a). In a subsequent notice published by the EEOC in the Federal Register it is stated, "Matter issued pursuant to 29 C.F.R. §1601.30(a) is issued to a specific addressee(s) and has no effect upon situations other than that of the specific addressee(s)." 35 F.R. 18692, December 9, 1970; 1 *Employment Prac. Guide* ¶4070.30 n. 1. To imply that the opinion letter and the EEOC regulation may be placed on the same footing is simply incorrect.

Furthermore, the opinion letter deals with an issue not relevant to this case. As we have made clear, the situation of non-resident aliens is not before this Court.

Farah's attempt to analogize this case to the situation of resident aliens must also fail. First, the notice in the Federal Register cited above shows the clear intention of the EEOC that each opinion letter is designed for one fact situation only. Second, the letter itself carefully limits its discussion of issues.

Generally speaking, our immigration laws seek to protect domestic labor from competition from foreign labor. . . . To construe Title VII of the Civil Rights Act to protect non-resident aliens from discrimination in favor of United States citizens and resident aliens would place that statute in flat opposition to the policy of the Immigration & Nationality Act, and this result, we are sure, was not Congress' intention.

These considerations are clearly inapplicable in the case of aliens lawfully admitted for permanent residence. Although there is also language in the letter that "national origin" does not refer to whether a person is or is not a United States citizen, the Acting General Counsel makes sure to point out:

We also reserve any decision regarding discrimination against non-resident aliens of a particular national origin *or regarding discrimination in favor of United States citizens and against resident aliens.*

Id. (emphasis supplied). It is precisely that reserved question to which the EEOC addressed its subsequent regulation, 29 C.F.R. §1606.1(d).

Withdrawing Title VII's protection from aliens would do much to cripple the national origin discrimination prohibition. Not only is it important that EEOC regulations continue to be given "great deference" by this Court, *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), but it is also "the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970). Further, a decision in favor of the Petitioners would be fully consistent with constitutional principle, so recently rearticulated by this Court, that disfavors discrimination against lawfully admitted resident aliens. *Sugarman v. Dougall*, 41 U.S.L. Week 5138 (June 25, 1973); *In re Griffiths*, 41 U.S.L. Week 5143 (June 25, 1973).

CONCLUSION

For the reasons indicated above, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for the granting of appropriate relief.

Respectfully submitted,

MARIO G. OBLEDO

SANFORD JAY ROSEN

*Mexican American Legal Defense
and Educational Fund, Inc.*

145 Ninth Street

San Francisco, California 94103

Attorneys for Amicus Curiae

Counsel are indebted to George Schneider of the Columbia Law School, Class of 1974, for his assistance in the preparation of this brief.

APPENDIX

Opinion Letter of Acting General Counsel, Equal Employment Opportunity Commission, March 21, 1967. Released April 28, 1967.

In your letter you present the following fact situation:

Our client employs a substantial number of professional performers. These employees are represented by a labor organization as their collective bargaining agent. For many years the company and the union have enjoyed a harmonious and wholesome relationship.

The union has presented a proposal for adoption by the company which has caused the client much concern because it may be violative of the Civil Rights Act of 1964, particularly Sec. 703(a)(1) and (2). The union urges that the company agree that it maintain a policy of employing one citizen of the United States or one resident alien in the United States on each occasion that it employs a non-resident alien. The company's business is based upon the premise that it engages the world's greatest performers, and there has been public acceptance of this fact; consequently, the sole criteria used by the company in the hiring of its professional performers is the ability of the individual to perform, the uniqueness of the act, and the receptivity of the audience.

When the employees are engaged in a foreign country by our client, they are permitted to render their services in the United States by obtaining an H-1 Visa,

granted to individuals with exceptional and unique talent. Although national origin is not the reason for employment, nevertheless, the historical fact is that the overwhelming proportions of new acts and performers in this particular field have been and are non-resident aliens. As a general rule, the non-resident alien is employed in a foreign country and is then brought to the United States to perform his services; however, on occasion the non-resident alien may come to the United States for the purpose of seeking employment with our client and after his arrival, he may be employed by the company.

On the basis of the above facts you ask the following questions:

1. May a company and a union agree between themselves that for each non-resident alien who is employed outside of the country, employment must be given by the company to a citizen of the United States or a resident alien?

2. May a company and a union agree that for each non-resident alien who comes to the United States seeking employment with the company and is employed by the company after his entry into the United States, the company must hire a citizen of the United States or a resident alien?

Title VII of the Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. You present a situation in which the union has proposed that the company hire at least one United States citizen or resident alien for each non-resident alien

that it hires. The company would, of course, be free to hire a greater proportion of United States citizens or resident aliens if it so desired. This proposal, by placing a quota limit on the employment of non-resident aliens, discriminates against this group as a class, and the question is whether such discrimination is consistent with Title VII. We conclude that it is.

It is evident that discrimination against non-resident aliens generally is not the same as discrimination on the basis of national origin. "National origin" refers to the country from which the individual or his forebears came, see 110 Cong. Rec. 2549, not to whether or not he is a United States citizen, nor *a fortiori*, to whether, if an alien, he resides in or without the United States. It may be conceded that a limitation not specifically phrased in terms of national origin may nevertheless have the effect of unlawfully discriminating on the basis of national origin.¹ But where the discrimination is merely against non-resident aliens, it does not appear to us that the limitation is levelled at any particular national group, nor that it is even intended to benefit persons of a particular national origin, since citizens and resident aliens are equally the beneficiaries of the limitation.

Furthermore, it is not the policy of our law to grant to non-resident aliens as a class opportunities for employ-

¹ Thus, we have previously concluded that an advertisement for "British-trained" or "British-educated" office help would be viewed as an expression of a preference based on national origin unless it could be demonstrated that the preference was in fact based on differences in the nature or quality of their training as opposed to that available in this country.

ment on equal terms with citizens and resident aliens. Generally speaking, our immigration laws seek to protect domestic labor from competition from foreign labor, see Immigration and Nationality Act, as amended, § 203, 8 U. S. C. 1153; 1965 U. S. Code Cong. & Adm. News, pp. 3333-34. Indeed, the non-resident aliens described in your letter may be admitted to this country for the purpose of employment only upon petition of the prospective employer and upon a showing that they are "of distinguished merit and ability" and are coming "to perform temporary services of an exceptional nature requiring such merit and ability," 8 U. S. C. 1101(a)(15)(H); 8 C. F. R. 214.2(h). To construe Title VII of the Civil Rights Act to protect non-resident aliens from discrimination in favor of United States citizens and resident aliens would place that statute in flat opposition to the policy of the Immigration & Nationality Act, and this result, we are sure, was not Congress' intention. We conclude, therefore, that it is not an unlawful employment practice under Title VII of the Civil Rights Act for an employer or a labor organization, by collective bargaining agreements or otherwise, to discriminate against non-resident aliens, generally, and in favor of United States citizens and resident aliens.

In view of the above disposition, we do not reach the question whether the first exemption of section 702 of the Civil Rights Act is applicable to contracts of employment entered into abroad for performance in the United States. We also reserve any decision regarding discrimination against non-resident aliens of a particular national origin or regarding discrimination in favor of United States citizens and against resident aliens.

Finally, you ask whether there is a distinction under Title VII between a native-born citizen and a naturalized citizen. We prefer not to pass on such a question in the abstract, but we might point out that as a general proposition "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Schneider v. Rusk*, 377 U. S. 163, 84 S. Ct. 1187, 1189 (1964).

This is an opinion letter issued pursuant to 29 C. F. R. 1601.30.

In the Supreme Court of the United States

No. 75-071

CECILIA ESPINOZA and RODOLFO ESPINOZA,
Petitioners,

vs.

FARAH MANUFACTURING COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT

KENNETH R. CARR
P.O. Box 9519
El Paso, Texas 79905

JACK T. CHAPMAN
WILLIAM DUNCAN
2000 State National Plaza
El Paso, Texas 79901

Attorneys for Respondent

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In the Supreme Court of the United States

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners,

vs.

FARAH MANUFACTURING COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1) (the "Act"), and of Equal Employment Opportunity Commission Regulation, 29 C.F.R. § 1606.1(d) (1972), appear in Petitioner's Brief at pages 2-3.

QUESTION PRESENTED

Did Farah violate Section 703(a) of the Act by refusing to consider Espinoza for employment because she is not a United States citizen when more than 97% of Farah's employees in the position sought by Espinoza are of her Mexican national origin, as was the person hired in her stead?

STATEMENT

Espinoza, a resident alien whose national origin is Mexico, was denied consideration for employment by Farah pursuant to a long-standing employment policy which requires Farah employees to be United States citizens. Espinoza filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Farah had discriminated against her on the basis of national origin in violation of Section 703(a) of the Act. The Regional Director of the EEOC issued his Finding of Fact which included determinations that: (1) Espinoza believed that the persons hired in her stead were Spanish surnamed United States citizens; (2) Espinoza's sister-in-law, a Spanish surnamed citizen was employed by Farah; (3) Farah's San Antonio plant employs about 625 persons, 95% of whom are Spanish surnamed Americans; and (4) "The evidence in the record does not establish that . . . [Farah] refused to employ . . . [Espinoza] because she is Spanish surnamed."¹

Upon issuance by the EEOC of a Notice of Right to Sue, pursuant to 29 C.F.R. § 1601.25b(d) (1972), Espinoza brought suit. The District Court granted her motion for Summary Judgment, holding that Farah had discriminated against her on the basis of national origin in violation of Section 703(a) of the Act. The Fifth Circuit reversed,

1. Jt. App. 131-133. Although not included in the final form of his Finding of Fact, the earlier draft of "Regional Director's Finding of Fact," (Jt. App. 115) correctly sets forth the controlling issue and what Farah believes to be the correct disposition thereof:

"11. I find that the issue in this case is 'citizenship' and not national origin.

"12. I find no evidence in the record which indicates that [Farah] did not hire [Plaintiff] because of her national origin."

finding that Espinoza was "denied an opportunity for employment because she lacks United States citizenship, and for no other reason." 462 F.2d at 1333; Petition for Writ of Certiorari at 3a. The Court held that "Neither the language of the Act, nor its history, nor the specific facts of this case persuade us that such a refusal has been condemned by Congress." 462 F.2d at 1333-34; Petition for Writ of Certiorari at 5a.

SUMMARY OF ARGUMENT

Title VII prohibits discrimination on the basis of national origin. "[O]nce the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969), *rev'd on other grounds*, 400 U.S. 542 (1971). Espinoza's categorization of Farah's employment policy as "arbitrary" or "unjustified" does not render it unlawful nor does it invoke the standards of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In the first place, the legislative history of the Act supports Farah's and the Fifth Circuit's interpretation of the term "national origin," which looks to ancestry or ethnic background. The EEOC and the Office of Federal Contract Compliance apparently understand the term to mean "ethnic origin" or "ancestry," since both agencies use those words in regulations relating to national origin discrimination. Furthermore, the federal government, which has long prohibited national origin discrimination in federal employment, restricts job applications to United States citizens. Finally, a large number of states have fair employment practices legislation prohibiting national

origin discrimination in employment but still allow pre-employment inquiries on citizenship. In short, the Fifth Circuit interpretation is remarkable only for its consistency with the ordinary meaning and prevailing understanding of "national origin."

Second, the case involves a single resident alien of Mexican national origin, not any number of imaginary job applicants of varying national origins. It cannot be said that where over 90% of Farah's employees are of Mexican national origin, that Farah's employment policy discriminated against Espinoza or discriminates against Spanish language groups. Neither *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), nor *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), requires a different result.

Third, the EEOC guideline which prohibits discrimination on the basis of citizenship may be entitled to "great deference,"² *Griggs v. Duke Power Co.*, 401 U.S. at 434, but it is not entitled to blind adherence. Adherence to the guideline may be appropriate on another set of facts, but it is not appropriate here. Farah's preference for United States citizens did not result in discrimination against Espinoza on the basis of her Mexican national origin, the prohibited statutory ground of discrimination.

Fourth, Espinoza's reliance on 42 U.S.C. § 1981 is misplaced. The legislative history of that measure clearly shows that it prohibits private racial discrimination and racial and alienage discrimination in a state-action context. Legislative history also clearly shows, however, that Section 1981 does not, nor could it constitutionally, prohibit private alienage discrimination. Consequently, Farah's

2. There is a substantial due process question, which Farah has not pursued, whether the EEOC guideline is entitled to any weight in this case since it was promulgated on January 13, 1970, six months after Espinoza was denied consideration for employment.

preference for United States citizens is not prohibited by 42 U.S.C. § 1981.

Finally, the so-called "contemporary public policy to protect aliens," which Espinoza finds in recent Supreme Court cases involving state action and the Fourteenth Amendment, is merely an affirmation of the long-standing right of aliens to equal protection under the laws and has no relevance to the private sector. To be given effect, public policy must be properly grounded in the law. Since neither Title VII nor 42 U.S.C. § 1981 provides that foundation, it is incumbent upon Congress to express that policy (if it exists) in unequivocal language by an amendment to Title VII which would prohibit private discrimination on the basis of "alienage," "foreign origin," or "citizenship." Until that time, Farah's preference for United States citizens is not unlawful.

INTRODUCTION

The Court must determine whether Espinoza, a resident alien of Mexican national origin, was unlawfully discriminated against when Farah refused to consider her application for employment because she lacked United States citizenship. A decision will be reached *on the facts in this case*, and the facts must be put in a proper perspective.

Espinoza's references to various ethnic groups and their economic status, past and present, are irrelevant. This case involves a single resident alien of Mexican national origin whose one and only job application during three years of United States residence was at Farah. Jt. App. 74, 86.

Second, and simply to set the record straight, it is necessary to dispel the impression left by Petitioner's brief

that Farah's policy affects only aliens actually residing in the United States who intend to become United States citizens. The term "resident alien" simply refers to an alien, admitted to permanent United States residence, who has been issued a Form I-151 Alien Registration Receipt Card—the so-called "green card." The "resident" alien may actually reside in the United States, or he may reside outside the country (in Mexico, for example) and commute daily to work in the United States. But both the "commuter" and "resident" alien have identical immigration status. *Sam Andrews' Sons v. Mitchell*, 326 F. Supp. 35, 39 (S.D. Cal. 1971), *rev'd*, 457 F.2d 745, 749 (9th Cir. 1972). Their actual place of residence and citizenship intent, if any, may be quite different, however. Consequently, Farah's policy, which on the surface seems to affect only aliens with citizenship intent residing in the United States, in fact applies with equal force to large numbers of commuter aliens who have no intention of becoming United States citizens (or even of ever residing in the country) but who commute daily to take advantage of economic opportunities in the United States.³

Any issue involving aliens, including their employability (as a commuter or otherwise), necessarily cuts across an area of federal legislation and regulation which is constantly being reviewed.⁴ The legislative history of Title VII and the federal government's employment policy

3. The problem of the "commuter" alien displacing United States citizens of Mexican (or any other) national origin from employment is just one of many problems in the complex and inter-related area of immigration and naturalization. Any decision affecting this area, particularly in light of the Act and its legislative history, viewed against the background of the federal government's employment policy, is more properly left to Congress.

4. See H.R. 982, 93d Cong., 1st Sess. (1973), dealing with the employment of illegal aliens. See generally 8 U.S.C. §§ 1101-1503 and 8 C.F.R. Parts 1-4 (1973).

show conclusively that Congress did not intend to prohibit private employment preference for United States citizens. To accept Espinoza's argument that Title VII prohibits alienage discrimination would be to fly in the face of unambiguous statutory language to the contrary and of unmistakable congressional intent in an area peculiarly susceptible to congressional surveillance. It is against this background that the Court must determine whether a single alien of Mexican national origin was unlawfully discriminated against when she was refused employment consideration. by Farah.

I. The Fifth Circuit Interpretation of the Term "National Origin" As Used in Title VII Is Consistent with the Act's Legislative History and the Ordinary Meaning and Prevailing Understanding of That Term.

A. Legislative History and Government Agencies.

Proper statutory construction begins with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used. *Richards v. United States*, 369 U.S. 1 (1962). The ordinary meaning of the term "national origin" is the country of one's ancestry. The legislative history of the Act, as expressed in the Minority Report on Title VII, reflects exactly that understanding of the term.

There is no material change in the substantive provisions of this title and its predecessor title defining "unlawful employment practices" hence the general coverage of both provisions is the same. In defining the basis of discrimination, the subcommittee proposal contained the words "to discriminate against any individual because of his race, color, religion, national origin, or ancestry." The pending bill omits

the words "or ancestry." 2 U.S. Code Cong. & Ad. News 2445 (1964).

Congress obviously felt that the terms "national origin" and "ancestry" were synonymous and that the use of both was redundant. Clearly Congress understood that the deletion of the term "ancestry" did not change Title VII's general coverage. This understanding is further buttressed by the remarks of Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill.

"May I just make very clear that 'national origin' means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country. 110 Cong. Rec. 2548-49 (1964)."

Consequently, Espinoza's complaint that the Fifth Circuit interpretation of "national origin" is too narrow is more properly directed to Congress; the Fifth Circuit interpretation is merely an expression of unmistakable legislative intent.

But not only is the Fifth Circuit decision squarely on line with Congressional intent, it is an accurate expression of the prevailing understanding of "national origin." The EEOC, the very agency which is charged with enforcement of Title VII, uses the term "ethnic identity" in its regulations,⁵ "ethnic origin" in one of its forms,⁶ and explains the term "Spanish Surnamed American" (which must imply United States citizenship) in terms of Mexican, Puerto Rican, Cuban, or Spanish "origin,"⁷ i.e., *the country of origin or ancestry*. The Office of Federal Contract Com-

5. 29 C.F.R. § 1602.13 (1972).

6. Apprenticeship Information Report EEO-2-E, Instruction 7.

7. Employer Information Report EEO-1, App. 5; Apprenticeship Information Report EEO-2, explanatory n. 1.

pliance has issued recent guidelines on national origin discrimination. 41 C.F.R. § 60-50 (1973). The terms "ethnic groups," "ethnic organizations," "ethnic media," and "ancestry" are used throughout.

B. Federal Government Employment Policy.

The Fifth Circuit interpretation is also consistent with the federal government's understanding of the term national origin. In fact, the United States, in its Memorandum as Amicus Curiae on Petition for Writ of Certiorari in this case, expressly stated that "the United States agrees with the interpretation of 'national origin' by the court below."⁸

Since 1914 Civil Service Commission Regulations have limited the right to enter competitive examination for employment by the government to United States citizens. Executive Order No. 1997 (1914); see 5 C.F.R. § 338.101 (1972). Yet, since 1943, six Presidents of the United States have, by Executive Order, prohibited national origin discrimination in federal government employment.⁹ A former proviso to Section 701(b)¹⁰ of Title VII of the Act stated:

. . . That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race,

8. Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari at 5.

9. Exec. Order No. 9346 (1943) issued by President Roosevelt; Exec. Order No. 10308 (1951) by President Truman; Exec. Order No. 10479 (1953) by President Eisenhower; Exec. Order No. 10925 (1961) by President Kennedy; Exec. Order No. 10246 (1965) by President Johnson; and Exec. Order No. 11478 (1969) by President Nixon.

10. Civil Rights Act of 1964, Title VII, § 701(b), 78 Stat. 253 (1964).

color, religion, sex, or national origin and the President shall utilize his existing authority to effectuate this policy.

In the course of reorganizing some United States statutes, this proviso was repealed and re-enacted without material change as 5 U.S.C. § 7151. Furthermore, the Treasury, Postal Service, and General Government Appropriation Act, 1973 includes a provision that unless otherwise specified "no part of any appropriation contained in this or any other Act shall be used to pay compensation of any officer or employee of Government of the United States . . . unless such person is a citizen of the United States. . . ." ¹¹ Thus, it is readily apparent that the very legislative body which forbade discrimination in employment, both private and public, on the basis of national origin also imposes the citizenship requirement as a condition to employment by the federal government. Farah is doing no more than following the example set by the federal government, that is, interpreting its prohibition against national origin discrimination as being consistent with a citizenship prerequisite for hiring.

Espinoza's categorization of federal government employment policies as an "odd bit of backdoor legislation" ¹² has a hollow ring. In order for Espinoza's argument to have any validity at all, it must be assumed that the last six presidents of the United States had no idea that the Civil Service Commission has for the last fifty-nine years restricted federal government employment to the United States citizens. It must also be assumed that Congress, in enacting the 1964 Civil Rights Act and in reorganizing

11. § 602 P.L. 92-351; 86 Stat. 471 (1972). (Emphasis added.)

12. Petitioner's Brief at 43.

portions of that legislation in 1966, was not cognizant of federal government employment policies. Finally, in order to lend credence to Espinoza's argument, it must be assumed that Congress, in enacting any number of appropriations bills over the years, has not realized that the funds may not be used to pay any government employee who is not a United States citizen. The merits or the reasons for the government's policy are irrelevant. The important point is that for thirty years the government has prohibited national origin discrimination in federal employment but has seen no conflict in simultaneously retaining the United States citizenship requirement. The only plausible conclusion is that Congress did not in 1964, and does not now, consider national origin as synonymous with citizenship.

C. State Fair Employment Practices Legislation.

Finally, state fair employment practices legislation, which originated in New York in 1945, supports the Fifth Circuit's interpretation of the term "national origin." By the time of the passage of the 1964 Civil Rights Act some twenty-eight states had fair employment practices legislation.¹³ New York, and virtually all other states, had included "national origin" and/or "national ancestry" among the prohibited grounds of discrimination. Nevertheless, "national origin" is not interpreted to encompass "citizenship." To the contrary, many states had followed New York's lead in holding expressly that an employer's continued imposition of a requirement of United States citizenship as a precondition for employment was not inconsistent with the state's ban on discrimination on the basis of na-

13. EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 5-6.

tional origin.¹⁴ Finally, Minnesota, one of the states following New York's lead, defines "national origin" in its State Act Against Discrimination as "the place of birth of an individual or any of his lineal ancestors."¹⁵

Against this background of uniform interpretation of the term "national origin," Espinoza suggests that the Court look to her place of birth in order to determine whether there has been discrimination on the basis of national origin. Espinoza was born in Mexico; therefore, her one and only national origin is Mexico. As EEO Form-1 instructs, she is of Mexican "origin." But 92% of Farah's employees are of the same national origin, as was the person hired in her stead. Consequently, under the terms of Title VII, which prohibits discrimination on the basis of national origin (not "foreign origin" or "citizenship"), there has been no unlawful discrimination in this case.

14. Nineteen states have published pre-employment inquiry guidelines which instruct an employer on lawful inquiries which can be made of a job applicant. All prohibit discrimination on the basis of national origin, but eighteen of the nineteen states allow an employer to ask whether the applicant is a United States citizen. The states are Arizona, California, Delaware, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Washington, and West Virginia. Only New Jersey prohibits any inquiry about citizenship. See 2 CCH Employment Prac. Guide ¶20,000ff.

15. 2 CCH Employment Prac. Guide ¶24,401, §363.01 Minn. State Act Against Discrimination, Minn. Stat. (1969).

II. Where 92.5% of Farah's Work Force Is of Mexican National Origin, Farah's Preference for United States Citizens Does Not Discriminate Against Spanish Language Groups in Violation of Title VII, Phillips v. Martin Marietta Corp., or Griggs v. Duke Power Co.

It must be remembered that this case involves a single resident alien of Mexican national origin. Farah has shown that this one individual was not discriminated against on the basis of her Mexican national origin; it need not show that any number of imaginary job applicants have not been unlawfully discriminated against. The uncontroverted affidavit of Farah's corporate secretary, Pedro Villaverde, whose national origin is Mexico, indicates that at the time of the alleged violation in this case:

- (1) 92.5% of Farah's employees were of Mexican national origin;
- (2) 96.3% of the work force at the San Antonio plant was of Mexican national origin; and
- (3) 98.5% of the individuals employed in the position sought by Espinoza were of Mexican national origin. Jt. App. 36-38.

Espinoza does not allege that she was discriminated against on the basis of her national origin. The EEOC Regional Director found that Farah did not refuse to consider Espinoza because she is Spanish surnamed. Even the District Court acknowledged that the evidence negates "discrimination on the basis of ancestry or ethnic background." 343 F. Supp. at 1206; Petition for Writ of Certiorari at 11a. Finally, the Fifth Circuit found that "Espinoza was not denied a job because of her Spanish surname, her Mexican heritage, her foreign ancestry, her own or her par-

ents' birthplace . . . [but] because she had not acquired United States citizenship." 462 F.2d at 1333; Petition for Writ of Certiorari at 5a. Farah does not disagree with this overwhelming consensus of opinion.

Second, Farah need not show that if its employment policy were changed, a greater percentage of Mexicans would be employed. Such hypothetical speculation has no place before this Court. The simple fact is that a person of Mexican national origin was rejected, and a person of Mexican national origin was accepted. Thus, application of the employment policy had absolutely no effect on the percentage of Spanish language persons hired.

Third, Farah does not take refuge behind numbers. That 92.5% of its work force is of Mexican national origin does not show conclusively that Farah's treatment of Espinoza was legal. On the other hand, where Farah has already shown that Espinoza was not unlawfully discriminated against, the numbers certainly do not detract from Farah's position and, in fact, strengthen it. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), does not require a different result. In *Phillips* the employer refused to hire women with pre-school age children. When challenged by Mrs. Phillips, the employer argued that it was not guilty of sex discrimination on the theory that 75% to 80% of its employees were women; therefore, there could be no discrimination against women. The Court disagreed. There was sex discrimination because men with pre-school age children were hired, but not women with pre-school age children. At first blush, it might seem that Farah is taking the same position as *Martin Marietta*: Farah did not discriminate against Espinoza, because more than 90% of Farah's employees share Espinoza's national origin. There is a crucial difference, however. In *Phillips* the job applicant was a woman with pre-school age chil-

dren; no women with young children were employed, but men were. Women were treated differently than men. The result was sex discrimination. In the instant case, Espinoza is of Mexican national origin, but more than 90% of Farah's employees are of Mexican national origin. Espinoza has been discriminated against not because of her Mexican national origin (a prohibited basis of discrimination), but because of her citizenship (a basis of discrimination not prohibited by Congress). Lkening Farah's situation to the "sex-plus" discrimination in *Phillips* does not change that. Stated another way, in *Phillips* the employer's discrimination was directed, not at *people* with young children, but at *women* with young children. Farah's policy, on the other hand, affects all alien job applicants equally, regardless of national origin. Consequently, the resulting discrimination is not on the basis of national origin but alienage.¹⁶

Finally, under Farah's interpretation of "national origin," which is consistent with the legislative history of Title VII, the government's employment policy, and state fair employment practices legislation, there is no violation of Title VII. Simply referring to Farah's policy as "arbitrary and unjustified" will not invoke the standards of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* does not make unlawful the myriad of so-called "arbitrary" hiring policies not prohibited under Title VII. In other words, application of *Griggs* will not produce a national origin violation where none exists; and since there is no national origin discrimination here, *Griggs* is irrelevant.

16. Contrary to Petitioner's protestations (Petitioner's Brief at 20-21), that over the years Farah has hired a single Mexican alien and literally thousands of citizens is meaningless. If it proves anything, it is that Farah discriminates in favor of Mexican aliens.

III. Because Alienage Discrimination in This Case Did Not Result in Discrimination on the Basis of National Origin, Application of the EEOC Guideline Is Inappropriate.

The EEOC policy guideline provides:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship. . . . 29 C.F.R. § 1606.1(d) (1972).

Admittedly, a preference for United States citizens *could* be used to discriminate on the basis of national origin, but that is not the case here. As applied to the facts of this case, the EEOC guideline is inapposite.

Prior to its publication the EEOC agreed with Farah. The Regional Director in an early draft of his Finding of Fact correctly observed that "the issue in this case is 'citizenship' and not national origin."¹⁷ In a 1967 Opinion Letter, released April 28, 1967, and appended to this brief, the Acting General Counsel of the EEOC held that discrimination against nonresident aliens did not constitute discrimination based on national origin. In the course of that opinion, the General Counsel said:

It is evident that discrimination against non-resident aliens generally is not the same as discrimination on the basis of national origin. "National origin" refers to the country from which the individual or his forbears came . . . not to whether or not he is a United States citizen, nor *a fortiori*, to whether, if an alien, he resides in or without the United States.¹⁸

17. Jt. App. 115.

18. Opinion Letter of Acting General Counsel, EEOC, March 21, 1967, Released April 28, 1967, and appended to this brief.

That Farah's preference for United States citizens affects both resident and nonresident aliens does not alter the correctness of the General Counsel's opinion. Neither does the subsequent publication of the EEOC guideline. The uncontradicted facts of *this case* remain unchanged; Farah has not used its longstanding citizenship requirement in any way which has resulted in discrimination against Espinoza because of her Mexican national origin.

This Court recognized in *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971), that the EEOC interpretation of the Civil Rights Act is "entitled to great deference." But this Court went on to say, "*Since the Act and its legislative history support the Commission's construction*, this affords good reason to treat the Guidelines as expressing the will of Congress." 401 U.S. at 434. (Emphasis added.) In the case at bar, however, neither the facts, the language of the Act, nor its legislative history support the EEOC guideline. *Griggs* does not advocate blind adherence to EEOC guidelines, but favors an analytical approach:

What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers of employment WHEN [not "because," as used in the EEOC guideline] the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. 401 U.S. at 431. (Emphasis added.)

Thus *unless* a citizenship requirement in employment results in national origin discrimination, there is no unlawful act. It has been overwhelmingly shown in *this case* that Farah's preference for United States citizens has not resulted in discrimination against Cecilia Espinoza on the basis of her Mexican national origin.

The EEOC has tacitly agreed. In the Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari filed in this case, it was admitted that:

... in the present case the record does not suggest that the Company was using the citizenship requirement as ... a subterfuge since more than ninety percent of its employees are of Mexican origin. Therefore, *this is not a case that presents the kind of practices that Title VII of the Act and the EEOC Guideline were intended to prevent.*¹⁹

Consequently, the Fifth Circuit in the eyes of the United States correctly rejected application of the EEOC guideline in this instance.

IV. Private Discrimination on the Basis of Alienage Is Not Prohibited by 42 U.S.C. § 1981.

Espinoza's delayed²⁰ reliance on 42 U.S.C. § 1981 is misplaced. That measure prohibits racial discrimination in the private sector and racial and alienage discrimination founded in state action. The statute's legislative history shows conclusively that Section 1981 does not prevent alienage discrimination in private employment.

A. The Thirteenth Amendment and the Civil Rights Act of 1866.

The Thirteenth Amendment to the United States Constitution prohibiting slavery and involuntary servitude was proclaimed effective on December 18, 1865.²¹ The en-

19. Memorandum for the United States as Amicus Curiae on Petition for Writ of Certiorari at 6. (Emphasis added.)

20. Petitioner's Brief on the Merits raises for the first time in this proceeding the question of the applicability of 42 U.S.C. § 1981 to Farah's actions.

21. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. Const. amend. XIII.

abling clause of that amendment gave Congress the "power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 (1968); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873). Legislation passed pursuant to the enabling clause "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not" and must relate to "slavery and its incidents." *Civil Rights Cases*, 109 U.S. at 21-24, 27 L.Ed. at 843.

The Civil Rights Act of 1866 was passed on April 9, 1866, pursuant to the enabling clause of the Thirteenth Amendment.²² Section 1 of the 1866 Act provided, in part:

That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery . . . shall have the same right, in every State and territory in the United States, to make and enforce contracts . . . to inherit, purchase, lease, sell, hold and convey real and personal property
14 Stat. 27 (1866).

The major purpose of the Act was "to secure to the recently freed Negroes all the civil rights secured to white men. . . . None other than citizens of the United States were within the provisions of the Act." *Hague v. CIO*, 307 U.S. 496, 509 (1938). See *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898); *United States v. Cruikshank*, 92 U.S. (2 Otto.) 542, 553-56, 23 L.Ed. 588, 592 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 95-98, 21 L.Ed. 394, 415 (1873) (Field, J., dissenting). The 1866 Act

22. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) for a discussion of the legislative history of the 1866 Act.

declared Negroes to be citizens of the United States and enumerated certain rights, attendant to that status, which could be enjoyed without discrimination because of race, color, or previous condition of servitude. *Elk v. Wilkins*, 112 U.S. 94, 112-15, 28 L.Ed. 643, 650 (1884) (Harland & Wood, JJ., dissenting); *United States v. Cruikshank*, 92 U.S. (2 Otto.) at 553-56, 23 L.Ed. at 592. That act was clearly not applicable to aliens as such, nor could it constitutionally be, since the measure was passed pursuant to the enabling clause of the Thirteenth Amendment. Such measures must relate to slavery and its incidents; alienage is not slavery.

B. The Fourteenth Amendment and the Civil Rights Act of 1870.

Against a background of concern that the sweeping provisions of the 1866 Act might be repealed or modified by subsequent legislation, the same Congress which passed the 1866 Act proposed the Fourteenth Amendment on June 13, 1866. The main purpose of the Fourteenth Amendment was to establish (or reaffirm) the citizenship of the Negro. See *In re Griffiths*, 41 U.S.L.W. 5143, 5149 (U.S. June 25, 1973) (Rehnquist, J., dissenting); *Elk v. Wilkins*, 112 U.S. 94, 101-03, 28 L.Ed. 643, 646 (1884); *United States v. Cruikshank*, 92 U.S. (2 Otto.) 542, 23 L.Ed. 588 (1876); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-73, 21 L.Ed. 394, 407 (1873). The first clause of the Amendment establishes citizenship; the second is concerned with privileges and immunities of citizens; but the third and fourth protect "any person," not just citizens. Thus, for the first time, protections were extended to aliens, but only in the state-action context of the Fourteenth Amendment.²³

23. See *Moose Lodge No. 197 v. Irvis*, 407 U.S. 163, 172 (1972) reaffirming the long-standing proposition that the Fourteenth Amendment does not reach private discrimination. See *Civil Rights Cases*, 109 U.S. 3 (1883).

The Civil Rights Act of 1870 was passed on May 31, 1870.²⁴ "Its purpose was to enforce the provisions of the Fourteenth Amendment, pursuant to the authority granted to Congress by the fifth section of the amendment. By §18 it reenacted the Civil Rights Act of 1866." *Hague v. CIO*, 307 U.S. 496, 510, 83 L.Ed. 1423, 1434 (1938). Thus, Section 1 of the 1866 Act, which extended citizenship to Negroes and enumerated certain rights of citizens (among them personal rights, including the right to enforce contracts, and property rights) was reenacted. Broadening the coverage of the 1866 Act was Section 16 of the 1870 Act which extended to "all persons within the jurisdiction of the United States" (aliens) those personal rights, including the right to enforce contracts; originally enumerated and limited to citizens in Section 1 of the 1866 Act. The property rights given to citizens in Section 1 of the 1866 Act, however, were not extended to "all persons within the jurisdiction of the United States" by the 1870 Act. Consequently, after passage of the 1870 Act, the situation was this: Citizens enjoyed certain personal and property rights enumerated in the 1866 Act and were protected from *private racial discrimination* under the provisions of that Act passed pursuant to the Thirteenth Amendment; as a result of the Fourteenth Amendment and the 1870 Act passed pursuant thereto, citizens were also protected from racial discrimination founded on state action. Aliens, however, were protected only by the state action provisions of the Fourteenth Amendment and Section 16 of the Civil Rights Act of 1870 (passed pursuant to that amendment) which extended to them certain personal rights, including the right to enforce contracts.

That the 1866 Act was reenacted in 1870 was of no moment to aliens; they were not covered by the earlier

24. 16 Stat. 144 (1870).

act, nor could they be since the 1866 Act was passed pursuant to the enabling clause of the Thirteenth Amendment which authorized legislation pertaining to slavery and its incidents. Any protection derived from the 1870 Act was as a result of provisions which were added to the 1866 Act. Thus, the derivation of 42 U.S.C. § 1981, as *pertains to aliens*, is Section 16 of the 1870 Act, founded on the Fourteenth Amendment which reaches state action;²⁵ aliens had no enumerated rights prior to that. It is equally clear that as *pertains to citizens and racial discrimination*, the derivation of 42 U.S.C. § 1981 is Section 1 of the 1866 Act founded on the Thirteenth Amendment, which reaches private racial discrimination. The inescapable conclusion is that 42 U.S.C. § 1981 protects persons from private racial discrimination but not private alienage discrimination. It is equally clear and undisputed by Farah that Section 1981 is applicable to alienage discrimination, *but only in the state action context* of the Fourteenth Amendment. The result is that Section 1981 applies to private and state-action racial discrimination and state-action alienage discrimination, but not to alienage discrimination in private employment.

Thus, Espinoza's argument that "Section 1981 applies to private employment discrimination," Petitioner's Brief 27-30, is correct—as far as it goes. Every case cited by Espinoza in support of that argument, beginning with *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), involves racial discrimination.²⁶ Farah's examination of the legislative history of Section 1981 shows conclusively that that measure applies only to *racially motivated private employment discrimination*. In *Jones v. Alfred H. Mayer Co.*, *supra* at 413, this Court remarked that Section 1982, which, along

25. See *Moose Lodge No. 197 v. Irvis*, 407 U.S. 163, 172 (1972).

26. Petitioner's Brief at 30, n. 30.

with Section 1981, has its origin in Section 1 of the 1866 Act, "deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin." In *Georgia v. Rachel*, 384 U.S. 780, 791, (1966), this Court also said, "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." To the same effect are *Snowden v. Hughes*, 321 U.S. 1, *reh. den.*, 321 U.S. 804 (1944); *United States v. Cruikshank*, 92 U.S. (2 Otto.) 542, 23 L. Ed. 588 (1876); *Agnew v. Compton*, 239 F.2d 226 (9th Cir.), *cert. denied*, 353 U.S. 959 (1957); *Braden v. Univ. of Pittsburgh*, 343 F. Supp. 836 (W.D. Pa. 1972), *vacated and remanded* (on state action), 477 F.2d 1 (3d Cir. 1973); *Abshire v. Chicago & E. Ill. R.R.*, 352 F. Supp. 601 (N.D. Ill. 1972); *Forst v. First Nat'l Bank*, 5 FEP Cas. 609 (D.D.C. 1972); *Tramble v. Converters Ink Co.*, 343 F. Supp. 1350 (N.D. Ill. 1972). See also *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621, 623 (8th Cir. 1972); *Marshall v. Plumbers Local No. 60*, 343 F. Supp. 70, 72 (D.C. La. 1972); *Elkanich v. Alexander*, 315 F. Supp. 659 (D.C. Kan.) *aff'd*, 430 F.2d 1178 (1970); *Ambrek v. Clark*, 287 F. Supp. 208, 210 (D.C. Pa. 1968); *Swift v. Fourth Nat'l Bank*, 205 F. Supp. 563, 566 (D.C.M.D. Ga. 1962).

Espinoza is also partially correct when she argues that "Section 1981 protects against discrimination based on alienage." Petitioner's Brief 31-34. As Farah has shown in its examination of the legislative history of Section 1981, that measure protects against alienage discrimination *only in a state action context*. *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972), is apparently the only case which has held that Section 1981 prevents alienage discrimination in private employment. The court pointed to the Thirteenth Amendment which provides the constitutional foundation for prohibit-

ing private discrimination pursuant to Section 1981. The court failed to realize, however, that any legislation passed pursuant to that Amendment must deal with slavery and its incidents. *Civil Rights Cases*, 109 U.S. 3 (1883). Since alienage is not related to slavery and its incidents, private alienage discrimination cannot be prohibited by Section 1981 which is derived from Section 1 of the 1866 Act passed pursuant to the enabling clause of the Thirteenth Amendment. Thus, *Espinoza* is not entitled to a judgment under the provisions of 42 U.S.C. § 1981.

V. The So-Called "Contemporary Public Policy to Protect Aliens," Which *Espinoza* Discerns As Prevailing in This Country, Is Merely a Continuing Affirmation of Long-Standing Alien Rights under the Fourteenth Amendment and Does Not Prohibit Private Employment Preference for Citizens.

A so-called public policy which cannot be properly grounded in law remains just that—public policy with absolutely no force or effect. In the first place, it is highly questionable that there is a "contemporary public policy to protect aliens."²⁷ The numerous recent Supreme Court cases involving aliens have nothing whatever to do with a "contemporary public policy." Those state-action cases merely state the law as it has stood for over one hundred years—that is, "all persons within the jurisdiction of the United States," are entitled to the equal protection of the law.²⁸ Second, even if there is a contemporary public policy to protect aliens, that policy cannot find a proper foundation in the law. *Farah* has already shown, and will not repeat the numerous reasons here, that Title VII's

27. Petitioner's Brief at 38-44.

28. See generally *Sugarman v. Dougall*, 41 U.S.L.W. 5138 (U.S. June 25, 1973); *In re Griffiths*, 41 U.S.L.W. 5143 (U.S. June 25, 1973); *Graham v. Richardson*, 403 U.S. 365 (1971).

prohibition of national origin discrimination does not embrace alienage. Farah has also shown that its preference for citizens is not, nor can it constitutionally be, prohibited by 42 U.S.C. § 1981. Finally, Espinoza's categorization of Title VII as the "private employment analog of the Fourteenth Amendment"²⁹ is grasping at straws. To argue, in effect, that since the Fourteenth Amendment guarantees aliens equal protection of the law, Title VII should prevent alienage discrimination in private employment ignores completely the legal parameters and constitutional origin of those measures.

Espinoza places great reliance on *Graham v. Richardson*, 403 U.S. 365 (1971). The "judicial solicitude" of *Graham*, appropriate in state action cases to protect constitutional rights and guarantees, is one thing; but the judicial contortion required to equate "national origin" with "citizenship" in a statutory construction case is quite another. Even the *Graham* Court spoke of separate classifications based on alienage, nationality, and race. To speak of both alienage and nationality (or citizenship and national origin, if you will) would be redundant unless the words have different meanings. Although discrimination on the basis of both classifications could have been proscribed by Congress, Title VII speaks only of national origin, not citizenship. Furthermore, the *Graham* Court indicates an interpretation of "nationality" (or national origin) consistent with Farah's. When speaking of nationality classification, the Court cited cases all of which involve discrimination on the basis of *ancestry*, not citizenship, 403 U.S. at 371 n.5. In short, Espinoza's reliance on *Graham* and a so-called "contemporary public policy" simply misses the mark.

29. Petitioner's Brief at 39.

Espinoza also sees in federal immigration laws a governmental concern for the employability of aliens. That concern, however, does not even extend far enough to allow aliens employment in the federal civil service.³⁰ Consequently, the argument that alienage discrimination in private employment interferes with the federal immigration scheme has a hollow and unconvincing ring when the government itself, with narrow exception, bars employment to aliens.³¹

If this "contemporary public policy to protect aliens" has the vitality and validity attributed to it by Espinoza, surely it will be given voice by Congress in clear and unequivocal terms by an amendment to Title VII prohibiting discrimination on the basis of "alienage," "foreign origin," or "citizenship." Until that time, however, Farah is free to prefer citizens so long as implementation of that policy does not discriminate on the basis of national origin.

30. 5 C.F.R. § 338.101 (1972). See text accompanying notes 9-12, *supra*.

31. Espinoza would have private employers shoulder the entire burden for insuring the employability of aliens, while imposing no such responsibility on the federal government.

CONCLUSION

Since Farah did not discriminate against Cecilia Espinoza because of any reason prohibited by Congress, the Fifth Circuit decision should be affirmed.

Respectfully submitted,

KENNETH R. CARR

P.O. Box 9519

El Paso, Texas 79985

JACK T. CHAPMAN

WILLIAM DUNCAN

P.O. Box 2800

El Paso, Texas 79999

Counsel for Respondent

CERTIFICATE

I hereby certify that on August 3, 1973, copies of the foregoing were mailed, postage prepaid, to George Cooper, 435 W. 116th Street, New York, New York 10027 and to Ruben Montemayor, 1414 Tower Life Building, San Antonio, Texas 78205, Attorneys for Petitioner. I further certify that all parties required to be served have been served.

WILLIAM DUNCAN

Opinion Letter of Acting General Counsel, Equal Employment Opportunity Commission, March 21, 1967. Released April 28, 1967.

In your letter you present the following fact situation:

Our client employs a substantial number of professional performers. These employees are represented by a labor organization as their collective bargaining agent. For many years the company and the union have enjoyed a harmonious and wholesome relationship.

The union has presented a proposal for adoption by the company which has caused the client much concern because it may be violative of the Civil Rights Act of 1964, particularly Sec. 703(a)(1) and (2). The union urges that the company agree that it maintain a policy of employing one citizen of the United States or one resident alien in the United States on each occasion that it employs a non-resident alien. The company's business is based upon the premise that it engages the world's greatest performers, and there has been public acceptance of this fact; consequently, the sole criteria used by the company in the hiring of its professional performers is the ability of the individual to perform, the uniqueness of the act, and the receptivity of the audience.

When the employees are engaged in a foreign country by our client, they are permitted to render their services in the United States by obtaining an H-1 Visa, granted to individuals with exceptional and unique talent. Although national origin is not the reason for employment, nevertheless, the historical fact is that the overwhelming proportions of new acts and per-

formers in this particular field have been and are non-resident aliens. As a general rule, the non-resident alien is employed in a foreign country and is then brought to the United States to perform his services; however, on occasion the non-resident alien may come to the United States for the purpose of seeking employment with our client and after his arrival, he may be employed by the company.

On the basis of the above facts you ask the following questions:

1. May a company and a union agree between themselves that for each non-resident alien who is employed outside of the country, employment must be given by the company to a citizen of the United States or a resident alien?

2. May a company and a union agree that for each non-resident alien who comes to the United States seeking employment with the company and is employed by the company after his entry into the United States, the company must hire a citizen of the United States or a resident alien?

Title VII of the Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. You present a situation in which the union has proposed that the company hire at least one United States citizen or resident alien for each non-resident alien that it hires. The company would, of course, be free to hire a greater proportion of United States citizens or resident aliens if it so desired. This proposal, by placing a quota limit on the employment of non-resident aliens, discriminates against this group as a class, and the question is whether such discrimination is consistent with Title VII. We conclude that it is.

It is evident that discrimination against non-resident aliens generally is not the same as discrimination on the basis of national origin. "National origin" refers to the country from which the individual or his forebears came, see 110 Cong. Rec. 2549, not to whether or not he is a United States citizen, nor *a fortiori*, to whether, if an alien, he resides in or without the United States. It may be conceded that a limitation not specifically phrased in terms of national origin may nevertheless have the effect of unlawfully discriminating on the basis of national origin.¹ But where the discrimination is merely against non-resident aliens, it does not appear to us that the limitation is levelled at any particular national group, nor that it is even intended to benefit persons of a particular national origin, since citizens and resident aliens are equally the beneficiaries of the limitation.

Furthermore, it is not the policy of our law to grant to non-resident aliens as a class opportunities for employment on equal terms with citizens and resident aliens. Generally speaking, our immigration laws seek to protect domestic labor from competition from foreign labor, see Immigration and Nationality Act, as amended, § 203, 8 U. S. C. 1153; 1965 U. S. Code Cong. & Adm. News, pp. 3333-34. Indeed, the non-resident aliens described in your letter may be admitted to this country for the purpose of employment only upon petition of the prospective employer and upon a showing that they are "of distinguished merit and ability" and are coming "to perform temporary services of an exceptional nature requiring such merit and ability," 8 U. S. C. 1101(a)(15)(H); 8 C. F. R. 214.2(h).

1. Thus, we have previously concluded that an advertisement for "British-trained" or "British-educated" office help would be viewed as an expression of a preference based on national origin unless it could be demonstrated that the preference was in fact based on differences in the nature or quality of their training as opposed to that available in this country.

To construe Title VII of the Civil Rights Act to protect non-resident aliens from discrimination in favor of United States citizens and resident aliens would place that statute in flat opposition to the policy of the Immigration & Nationality Act, and this result, we are sure, was not Congress' intention. We conclude, therefore, that it is not an unlawful employment practice under Title VII of the Civil Rights Act for an employer or a labor organization, by collective bargaining agreements or otherwise, to discriminate against non-resident aliens, generally, and in favor of United States citizens and resident aliens.

In view of the above disposition, we do not reach the question whether the first exemption of section 702 of the Civil Rights Acts is applicable to contracts of employment entered into abroad for performance in the United States. We also reserve any decision regarding discrimination against non-resident aliens of a particular national origin or regarding discrimination in favor of United States citizens and against resident aliens.

Finally, you ask whether there is a distinction under Title VII between a native-born citizen and a naturalized citizen. We prefer not to pass on such a question in the abstract, but we might point out that as a general proposition "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Schneider v. Rusk*, 377 U.S. 163, 84 S. Ct. 1187, 1189 (1964).

This is an opinion letter issued pursuant to 29 C. F. R. 1601.30.

AUG 24 1973

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,*Petitioners,*

vs.

FARAH MANUFACTURING Co., Inc.,

Respondent.

REPLY BRIEF FOR PETITIONERS

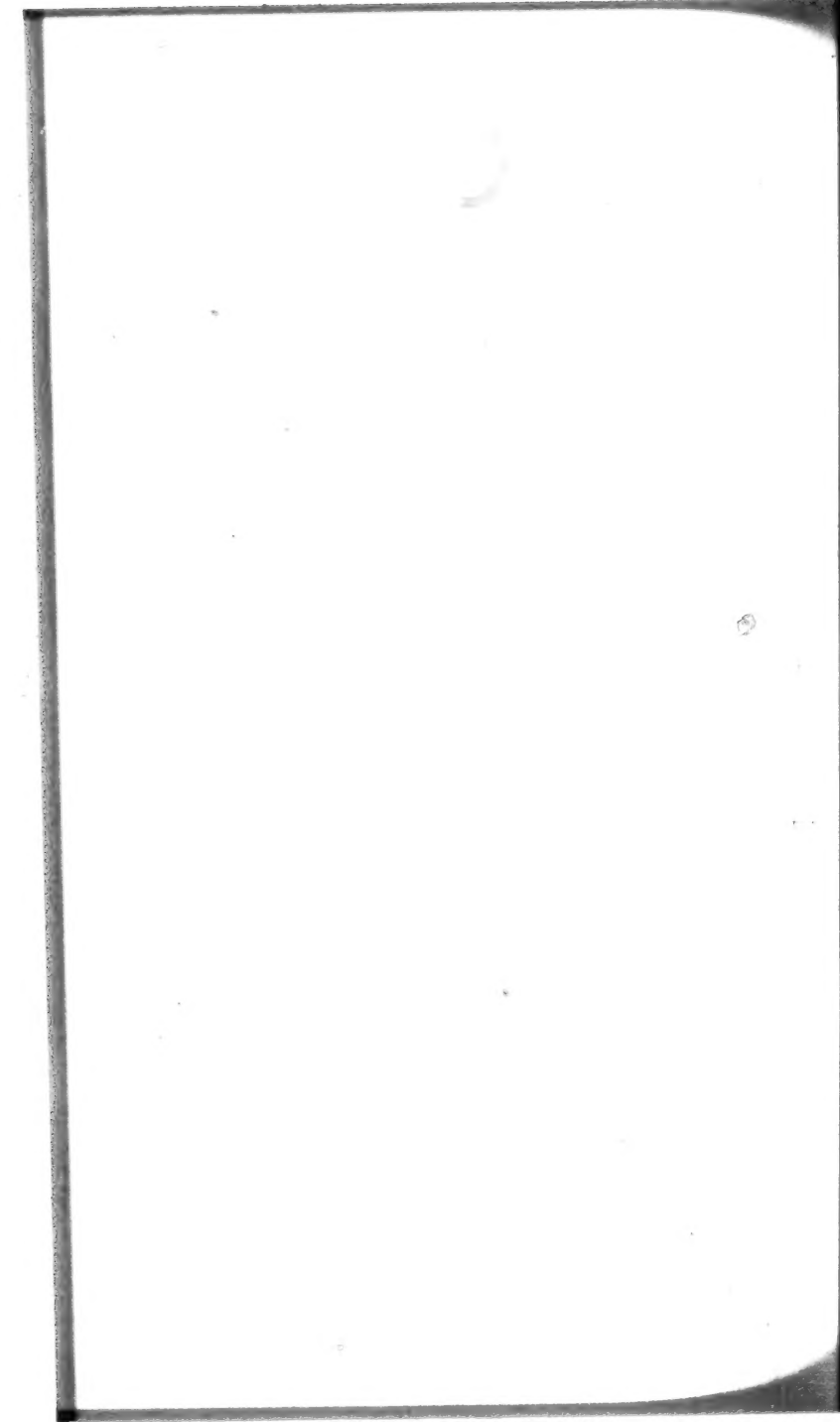
GEORGE COOPER
435 West 116th Street
New York, New York 10027
(212) 280-4291

RUBEN MONTEMAYOR
1414 Tower Life Building
San Antonio, Texas 78205

Attorneys for Petitioner

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IN THE
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REPLY BRIEF FOR PETITIONERS

This reply brief is subdivided in accordance with the five major headings used in both petitioners' and respondent's main briefs.*

I.

Whether "national origin" discrimination should be limited to "ancestry" discrimination.

Petitioners have argued that birthplace as well as ancestry is relevant to determining national origin, and that Farah's citizenship requirement is a form of national origin discrimination because it is so directly related to place of birth. The requirement gives a clear preference to persons of U.S. birth, who are automatically citizens, and imposes a special burden (the burden of going through the naturalization process) on persons of foreign birth. Respon-

* Please note that, by typographical error, the last two argument headings in Petitioners' main brief are both numbered "IV."

dent's brief simply ignores this aspect of a citizenship requirement, as if special burdens on the foreign born merely because of their place of birth were permissible under Title VII. Under respondent's view of Title VII, an employer could insist that a foreign born person satisfy any irrelevant requirement or could even refuse to hire all persons born outside the United States. This view, we submit, makes a mockery of both the language and purpose of Title VII's protection against national origin discrimination.

II.

Whether open discrimination against foreign nationals can be compensated for by the hiring of U.S. citizens with similar foreign ancestry.

Farah's claim that it is insulated from Title VII attack by the hiring of large numbers of Mexican-Americans has been fully dealt with in petitioners' main brief. For the record, however, we do note two factual errors in respondent's brief on this point.

First, at page 14, lines 10-11, Farah alleges, without citation to the appendix, that "a person of Mexican national origin" was hired in lieu of the petitioner, Mrs. Espinoza. The record does not support that claim. There is no credible evidence in the record regarding the nationality, ancestry or other origins of the persons hired in lieu of Mrs. Espinoza.

Second, at page 15, footnote 16, respondent concedes that it has hired an alien on at least one occasion, in violation of its supposedly firm policy, but alleges that this alien was a Mexican, thus ostensibly showing its concern for Mexicans. There is no evidence in the record to support any claim as to the nationality or ancestry of this alien

who was hired. Farah has consistently refused to provide any such information. Jt. App. 29, at ¶ 7.

III.

Whether the EEOC Guidelines on Discrimination Because of National Origin make respondent's practice unlawful.

Farah apparently does not deny that present EEOC Guidelines bar discrimination because of alienage. The company does, however, refer to an earlier Opinion Letter of the EEOC General Counsel, dated March 21, 1967, as supporting its position. It is important to note that Farah makes no claim that it was misled by this opinion or that it would otherwise be unfairly affected by any supposed change in EEOC policy. Careful examination of this Opinion Letter (reprinted at pp. A1-A4 of Brief for Respondent, and also at pp. 11-15 of the Brief of Mexican American Legal Defense and Education Fund, *Amicus Curiae*) shows that any such claim would be unfounded. The opinion letter is addressed to the issue of discrimination against *non-resident* aliens, as to whom quite different consideration apply than to *resident* aliens such as Mrs. Espinoza. The opinion letter clearly recognizes this distinction and expressly "reserve[s] any decision . . . regarding discrimination in favor of United States citizens and against resident aliens." In any event, there is no authority in law for Farah to place any reliance on this opinion letter. EEOC rules provide that such an opinion letter, issued pursuant to 29 C.F.R. §1601.30, is "issued to a specific addressee(s) and has no effect upon situations other than that of the specific addressee(s)." 35 Fed. Reg. 18692 (Dec. 9, 1970), 1 CCH Emp. Prac. Guide ¶4070.30 n.1.

IV.

Whether Farah's discrimination against aliens violates 42 U.S.C. § 1981.

Petitioner's main brief discusses 42 U.S.C. §1981, which is derived from the Civil Rights Act of 1866, as amended in 1870, to demonstrate Congress' longstanding concern for the employment rights of aliens. Respondent apparently concedes that this provision bars employment discrimination based on either race or alienage. Respondent also concedes that, at least so far as race discrimination is involved, the provision bars private discrimination as well as discrimination based on state action. However, respondent argues that when alienage discrimination is involved, as distinguished from race discrimination, the coverage of §1981 must be limited to state action situations.

This distinction between the scope of coverage of race discrimination and of alienage discrimination is not based on anything in the language of the statute itself. Rather respondent's argument is constitutionally based. As we understand it, respondent's argument is that the only constitutional bases of §1981 are the Thirteenth Amendment and the Fourteenth Amendment and neither of these justifies a bar to private discrimination against aliens. Under the Thirteenth Amendment respondent argues that only discrimination related to slavery may be prohibited. Under the Fourteenth Amendment respondent argues that only discrimination based on state action may be covered. Thus, respondent's position seemed to be that there is no constitutional authority for Congress to bar discrimination that is both against aliens and private.

Respondent's constitutional analysis is plainly wrong. First, there is substantial doubt as to the correctness of respondent's conclusion as to the scope of Congressional

authority under the Fourteenth Amendment. While it is clearly correct that the amendment itself only extends to state action, it is also clear that pursuant to the enforcement authorization of section 5 of the amendment Congress may reach somewhat beyond the confines of the amendment's prohibitions. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966). However, we need not concern ourselves with that fine constitutional point in this case, for there is a more patent error in respondent's argument. When discrimination against aliens is involved, Congressional authority is not limited to the Thirteenth and Fourteenth Amendments. The Federal Congress has plenary authority to regulate immigration and naturalization. Art. 1, §8, cl. 4; Art. 1, §9; see, e.g., *Graham v. Richardson*, 403 U.S. 365, 376-80 (1971). Pursuant to that authority Congress has traditionally and lawfully addressed itself to the employment status of resident aliens, and assuring the employability of aliens continues to be a subject of Federal legislation. See Brief for Petitioner, pp. 40-41. Article 1 of the Constitution thus provides an unquestioned source of authority for Congress to bar private discrimination against aliens.

Given this obvious source of Congressional authority to extend §1981's alien protection to private employment discrimination, the only bona fide issue regarding §1981 is whether Congress intended it to reach this discrimination. That issue, we submit, has been resolved by *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) and by the long line of cases which have squarely established that the right "to make and enforce contracts" in §1981 was intended to bar private employment discrimination. See cases cited in Brief for Petitioner, p. 30 n. 30. Any attempt to artificially engraft a state action requirement onto §1981 when such is not constitutionally compelled, would simply be a replay of the issue in *Jones*.

In sum, Section 1981 plainly extends the right to aliens as such to be protected against certain enumerated forms of discrimination; judicial interpretation has clearly established that one of those enumerated forms of discrimination is private employment discrimination. Since there is ample Congressional power to grant this right, §1981 bars Farah's alienage discrimination.

V.

Whether there is a "contemporary public policy to protect aliens."

While respondent denies there is any trend toward protecting aliens, the most recent decisions of this Court, issued subsequent to the filing of petitioner's main brief, give further evidence of this trend. In *Sugarman v. Dougall*, — U.S. —, 93 Sup.Ct. 2842 (1973) and *In re Griffiths*, — U.S. —, 93 Sup. Ct. 2851 (1973), the Court upheld the rights of resident aliens to jobs and participation in the professions without automatic disqualification because of their noncitizen status. The basis of these decisions—that it is irrational and inconsistent with Fourteenth Amendment traditions of equality to engage in job discrimination against aliens—is applicable to Title VII as well.

GEORGE COOPER
435 West 116th Street
New York, New York 10027
(212) 280-4291

RUBEN MONTEMAYOR
1414 Tower Life Building
San Antonio, Texas 78205

Attorneys for Petitioner

Certificate of Service

I HEREBY CERTIFY that three true and correct copies of the foregoing Reply Brief of Petitioners were served by mail upon Kenneth R. Carr, Esq., P.O. Box 9519, El Paso, Texas 79985, this day of August, 1973.

.....
GEORGE COOPER

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,
Petitioners

v.

FARAH MANUFACTURING Co., INC., *Respondent*

On Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

**MOTION OF FACILITIES MANAGEMENT CORPORATION
FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Facilities Management Corporation (FMC), pursuant to Rule 42(3), respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. FMC has neither sought nor obtained the consent of the attorneys for either party to the filing of this motion and the attached brief. In support of its motion, FMC states:

1. The question before this Court is whether an employer's refusal to hire an alien lawfully admitted for permanent residence in the United States solely because that person is not a citizen of the United States constitutes employment discrimination on the

basis of national origin in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1).

2. The briefs of both parties and of amicus Mexican American Legal Defense and Educational Fund are broadly addressed to the applicability of Title VII to "alienage discrimination."

3. FMC operates a maintenance and repair station for aircraft on Wake Island under a contract with the United States Air Force. Under this contract, FMC employs nationals of the Republic of the Philippines who have filed charges with the Equal Employment Opportunity Commission (EEOC) complaining that they are paid less than U.S. citizens employed by FMC under the contract.

4. The charges filed by the Filipino employees claim unlawful discrimination under Title VII on the basis of national origin. FMC has filed a statement with the EEOC which asserts, among other points, that Title VII does not apply to FMC's employment of Filipinos on Wake Island. The matter of the applicability of Title VII is now pending before the national office of EEOC.

5. The Filipinos employed by FMC on Wake Island are paid pursuant to an Agreement between the United States and the Republic of the Philippines, which was signed and entered into force on December 28, 1968. TIAS 6598; 19 UST 7560.

6. The legal and policy issues involved in the case of petitioner Espinoza, who has been lawfully admitted for permanent residence in the United States, are fundamentally different from those involved in the claim of the Filipinos employed by

FMC, who travel to Wake Island on documents issued by the Republic of the Philippines.

7. FMC desires to bring this difference to the attention of the Court and to show why, if the Court decides that Title VII applies to alienage discrimination as discussed by the parties and amicus Mexican American Legal Defense and Educational Fund, decision on the status of Philippine nationals employed in the Pacific should be reserved for a future case, if any, when the applicable legal and policy considerations can be adequately presented to the Court.

8. This motion was not earlier filed because FMC awaited the filing of the briefs of the parties in an effort to avoid moving the Court for leave to file an amicus brief that was unnecessary or redundant.

Accordingly, FMC requests leave to file the attached brief.

Respectfully submitted,

JOHN B. MILLIKEN

PARKER, MILLIKEN,

KOHLMEIER, CLARK

& O'HARA

606 South Olive Street

Los Angeles, California

90014

STEPHEN N. SHULMAN

CADWALADER, WICKERSHAM

& TAFT

1000 Connecticut Avenue,
N. W.

Washington, D. C. 20036

(202) 659-4700

Attorneys for

Amicus Curiae

IN THE
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**BRIEF OF FACILITIES MANAGEMENT
CORPORATION, AMICUS CURIAE**

INTEREST OF AMICUS

Amicus Facilities Management Corporation (FMC) operates a maintenance and repair station for aircraft on Wake Island under a contract with the United States Air Force. Its work force, like the work force of other Government contractors in the Pacific area, consists partially of nationals of the Republic of the Philippines and partially of citizens of the United States. The nationals of the Republic of the Philippines are employed pursuant to an Agreement between the United States and the Republic of the Philippines, which was signed and entered into force on December 28, 1968. TIAS 6598; 19 UST 7560. This

Agreement provides that the wages and fringe benefits paid to Filipinos on Wake Island, and elsewhere in the Pacific, shall be geared to those in effect for Filipino employees of the United States Military Forces in the Philippines. Agreement, Article II, Paragraphs 6 & 7.

The United States citizens employed on Wake Island by FMC are paid on the basis of wages and fringe benefits prevailing in the United States, which, of course, are higher than those prevailing in the Philippines. These citizen employees hold jobs for which a security clearance is required by the United States Air Force. Such clearance is not available to the Filipinos employed pursuant to the Agreement, although U.S. citizen employees of Filipino ancestry do receive such clearance and are employed—at U.S. citizen rates—in jobs for which a security clearance is required.

Filipinos employed pursuant to the Agreement have filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the payment of higher compensation to the U.S. citizen employees constitutes discrimination on the basis of national origin. *Cristino P. Palpalolatoc v. Facilities Management Corporation*, TLA2 1614 through TLA2 1676; TLA2 1807 through TLA2 1881.

FMC filed a statement with the Regional Director of the EEOC office in which the charges were filed, which asserts, among other points, that Title VII does not apply to FMC's employment of Filipinos on Wake Island. The Regional Director referred the matter to the national office for decision as to the applicability of Title VII. No decision has been rendered by the EEOC.

QUESTION PRESENTED

The question presented by the case at bar is whether an employer's refusal to hire an alien lawfully admitted for permanent residence in the United States solely because that person is not a citizen of the United States constitutes employment discrimination on the basis of national origin in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). The question whether or not Title VII applies to Filipino employees of FMC on Wake Island involves a number of legal and policy issues not subsumed by the question at bar.

STATEMENT OF CASE

Petitioner Cecilia Espinoza is an alien lawfully admitted for permanent residence in the United States, who lives in San Antonio, Texas, and has expressed a desire to become a citizen. She is married to Rudolfo Espinoza, who is an American citizen. Her application for employment at respondent's San Antonio division was rejected on the basis of its long standing policy to hire and employ only United States citizens (Petitioners' Appendix 2a).

Phillipine nationals who work for FMC on Wake Island are not lawfully admitted for permanent residence in the United States. They are not issued an Alien Registration Receipt Card, Form I-151, but travel to and from Wake Island on documents issued pursuant to the laws and regulations of the Republic of the Philippines. Agreement, Article II.

DISCUSSION

If the Court determines that alienage discrimination as it is discussed in the briefs of the parties and of amicus Mexican American Legal Defense and

Educational Fund does not violate Title VII, that decision would dictate a like conclusion for the employment of Filipinos by FMC on Wake Island. It does not follow, however, that a decision that such alienage discrimination does violate the Act would require a conclusion of violation by FMC or by the other Government contractors that employ Filipinos in the Pacific area pursuant to the Agreement.

The purpose of this brief is to bring the very different situation of the Filipinos in the Pacific to the Court's attention. The purpose further is to show why, if the Court decides that alienage discrimination as presented in this case is a violation of Title VII, the Filipino situation should not be subsumed in that decision but should be reserved for a later case, if one arises, in which the applicable legal and policy considerations can be adequately presented.

The Filipinos on Wake Island, unlike petitioner Espinoza, are not in any sense admitted for permanent residence in the United States. Indeed, for purposes of the Immigration and Nationality Act, these Filipinos are not even in the United States when they are on Wake Island. That Act defines the United States as "the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. §1101 (38). A state is defined as including "the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. §1101(36). The "outlying possessions of the United States" are defined as "American Samoa and Swains Island." 8 U.S.C. §1101(29). Wake Island has been held not to be an outlying possession. *United States v. Paquet*, 131

F. Supp. 32 (D.Hawaii 1955), *aff'd*, 236 F.2d 203 (9th Cir.), *cert. denied*, 352 U.S. 926 (1956).

Filipinos who work for Government contractors on Guam differ only in that they are in the United States while they are on Guam. But they too could not be said to have been admitted for permanent residence in any sense of the words; and they too travel on the basis of documents issued by the Republic of the Philippines.

This fundamental difference between Filipinos working for Government contractors in the Pacific and persons like petitioner who have been admitted for permanent residence in the United States has at least two employment implications. First, such Filipinos cannot be considered for jobs which require a security clearance. The Regulations of the Department of Defense on this score are clear:

... To be eligible to be processed for an industrial security clearance a contractor employee who is an immigrant alien must reside and must intend to reside permanently in the United States (including Puerto Rico, Guam and the Virgin Islands). An immigrant alien contractor employee who does not reside and who does not intend to reside permanently in the United States cannot be considered a bona fide candidate for issuance or continuation of a clearance. The processing of a request for clearance of such an immigrant alien causes needless effort and expense to the Department of Defense and to the contractor, serves no useful Government purposes, and will be administratively terminated without prejudice to the individual concerned.

32 C.F.R. §155.12(b)(2). The EEOC Guideline that is in issue in this case expressly recognizes and

authorizes this basis for excluding aliens from employment. 29 C.F.R. §1606.1(d).

The second employment implication is not provided for in the EEOC Guideline. That is, Filipinos employed by Government contractors in the Pacific, and by the Government itself, are traditionally paid a lower rate than U.S. citizen employees. This practice stems from the fundamental Government policy of paying alien employees in accordance with prevailing rates in the local area. Thus, the Foreign Service Act of 1946, as amended by Public Law 86-723, Sept. 8, 1960, provides:

Compensation Plans for Alien Employees

(a) The Secretary shall, in accordance with such regulations as he may prescribe, establish compensation plans for alien employees of the Service: Provided, that such compensation plans shall be based upon prevailing wage rates and compensation practices for corresponding types of positions in the locality, to the extent consistent with the public interest.

(b) For the purpose of performing functions abroad, other Government agencies are authorized to administer alien employee programs in accordance with the applicable provisions of this chapter. Aug. 13, 1946, c. 957, Title IV, §444, 60 Stat. 1006; Sept. 8, 1960, Pub. L. 86-723, §6, 74 Stat. 831.

22 U.S.C. §889.

The legislative purpose to relate the compensation of alien employees to that prevailing in their home area was intended to have uniform application throughout the Government:

This section is a clarification and simplification of section 444 of the act that deals with compensa-

tion for alien employees hired overseas. The new language will permit the establishment of wage and salary schedules for such employees to be based upon local prevailing pay practices for corresponding types of positions in the locality.

The new paragraph (b) confers authority upon other Government agencies to utilize the provisions of this act in their employment of alien personnel abroad. This will enable all Federal agencies employing such personnel to operate as a single employer by providing uniform employment conditions for all alien employees of the Government in a particular foreign labor market area who are working under similar conditions.

1960 U.S. Code, Cong. and Adm. News 3407, at 3410.

The Agreement governing FMC's employment of Filipinos on Wake Island implements this goal of uniformity. It applies alike to Filipinos working for the Government and for contractors with the Government. Whether they work for the United States directly or indirectly, these Filipino employees are guaranteed the same compensation. Within the Republic of the Philippines the wages and fringe benefits relate to those paid domestically, as first specified in an exchange of notes which were entered into force on May 16, 1947. TIAS 3646; 7 UST 2539. Filipinos employed outside the Republic receive the same basic compensation plus an overseas differential. In this respect, the Agreement continued in 1968 the practice established by the exchange of notes in 1947.

The compensation of Filipinos employed by FMC on Wake Island, and of those employed elsewhere in the Pacific by other Government contractors, is thus a matter of long tradition and successive government-

to-government agreement. It reflects, moreover, a Congressional purpose to harmonize the compensation of alien employees overseas.

But most important, it entails a number of legal and policy considerations that do not remotely resemble those concerned with the refusal of respondent to hire petitioner in San Antonio. These considerations would not suggest a different conclusion in the Pacific if the Court should find alienage discrimination not violative of Title VII when visited upon persons lawfully admitted for permanent residence in the United States. Should the Court find to the contrary, we respectfully request that decision on the status of Philippine nationals employed in the Pacific be reserved for a future case, if any, when the applicable legal and policy considerations can be adequately presented to the Court.

Respectfully submitted,

JOHN B. MILLIKEN
PARKER, MILLIKEN,
KOHLMEIER, CLARK &
O'HARA
606 South Olive Street
Los Angeles, California
90014

STEPHEN N. SHULMAN
CADWALADER, WICKERSHAM
& TAFT
1000 Connecticut Avenue,
N.W.
Washington, D. C. 20036
(202) 659-4700

Attorneys for
Amicus Curiae

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v.

FARAH MANUFACTURING Co., Inc., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

MEMORANDUM FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION AS
AMICUS CURIAE

DECISION BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 462 F.2d 1331, (5th Cir.). The decision of the district court (Pet. App. 10a-15a) is reported at 343 F.Supp. 1205.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1972. A petition for rehearing and rehearing en banc was denied on July 21, 1972. The petition for a writ of certiorari was filed on October 31, 1972, and was granted on April 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's refusal to hire a lawful resident alien because that person is not a citizen violates the prohibition against discrimination on the basis of national origin contained in Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . national origin

STATEMENT

The petitioner is a lawfully admitted resident alien of Mexican birth living in San Antonio, Texas, with her citizen husband (R. 74-75, 76-77). In July, 1969, she was rejected by respondent Company for employment as a seamstress at its San Antonio division company solely because she was not a citizen (R. 79, 85-86). The Company's action was in conformity with its policy

of hiring only citizens (R. 37). Citizens of Mexican ancestry make up more than 92 percent of the Company's total employees, 96 percent of its San Antonio employees, and 97 percent of people doing the work for which petitioner applied (R. 37-38).

In a suit brought by petitioner in the Western District of Texas under Title VII, the district court granted petitioner's motion for summary judgment, holding that the Company's refusal to hire her because she was not a citizen constituted discrimination on account of "national origin" within the meaning of Section 703(a) of Title VII, 343 F.Supp. 1205 (R. 69; Pet. App. 10a-15a).

The court of appeals reversed holding that Title VII does not prohibit discrimination against resident aliens except "where such a practice is symptomatic of or a necessary element within prohibited national origin discrimination, or where it is a mere pretense to camouflage national origin discrimination." 462 F.2d 1331, 1334 (Pet. App. 1a-9a). "National origin," the court below stated, should not be read to include citizenship; rather "national origin means exactly and only that," at 1332.

A R G U M E N T

DISCRIMINATION IN EMPLOYMENT ON THE GROUND OF ALIENAGE IS DISCRIMINATION BASED ON NA- TIONAL ORIGIN, FORBIDDEN BY TITLE VII.

A. The E.E.O.C. Guidelines are a Proper Interpretation of the Statute.

Congress has stated in Title VII that private employers subject to the Act may not discriminate against an individual because of the country from which that person came. Section 703(a)(1) provides that it is unlawful to fail to hire "any individual" because of

"national origin". In implementation of that provision the Equal Employment Opportunity Commission, the agency charged by Congress with primary responsibility for the implementation and enforcement of Title VII, has issued guidelines which state (29 C.F.R. 1606.1(d)): ¹

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question.

This is a reasonable interpretation of the statute which is entitled to great weight. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434. Since under the Fourteenth Amendment all persons born in the United States are citizens—a status which is nearly infeasible ²—the status of being an alien arises from the fact that an individual was not born in this country but came from elsewhere. To refuse to hire an individual because such person is an alien is therefore to disadvantage that person because of the country of his birth, i.e., a country other than the United States.

While persons born in this country automatically obtain citizenship at birth, individuals born elsewhere

¹ 35 Fed. Reg. 421 (January 13, 1970)

² See *Afroyim v. Rusk*, 387 U.S. 253.

can acquire citizenship only through a long and sometimes difficult process. Among the requirements for naturalization are an extended residency period of from three to five years, 8 U.S.C. 1427(a) and 1430 (see 8 C.F.R. 316a); a demonstration of the ability to read, write and speak English, 8 U.S.C. 1423(1) (see 8 C.F.R. 312.1); and a demonstration of "a knowledge of the fundamentals of history, and of the principles and form of the government of the United States," 8 U.S.C. 1423(2) (see 8 C.F.R. 312.2). The Company's citizenship requirement thus creates two different and unequal standards for employment: the native born are automatically eligible for employment while those born elsewhere are eligible for employment only after they have completed the requirement period of residency and passed the proficiency tests in English and civics. If this Company's policies were followed generally, lawfully resident aliens would be under an absolute bar to employment for the three to five year period during which a resident alien is not eligible for naturalization because of the residency requirement. In other words a group of employees is being deprived of the opportunity for employment for the sole reason that they were born outside the United States and have not obtained citizenship. That is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII.

As shown by its reference to the fact that there was no claim that respondent used the citizenship requirement as a camouflage, the decision of the court of appeals was influenced by its view that respondent has a pro-citizen rather than an anti-alien intent. But so long as the effect of respondent's practice is discriminatory, intent is immaterial. *Griggs v. Duke Power*

Co., 401 U.S. 424, 432. It is therefore not significant that respondent does not refuse to hire naturalized citizens who have the same birthplace as the petitioner resident alien. She, as an individual, is being subjected to employment discrimination because of her birth outside the United States. Thus she, as an individual, and others in her class suffer discrimination in employment based on their national origin.

An employer may not impose discriminatory conditions on a class protected by Title VII merely because there are other members of the class who are not directly affected by such conditions. In *Phillips v. Martin Marietta*, 400 U.S. 542, this Court rejected the defendant's argument that it could refuse to employ mothers with pre-school children, although employing fathers with such children, because a large majority of applicants hired for the position sought by the plaintiff were women. It held that Title VII "requires that [all] persons of like qualifications be given employment opportunities irrespective of their sex." 400 U.S. at 544. See also *Lansdale v. United Airlines*, 437 F.2d 454 (5th Cir.); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir.), *certiorari denied*, 404 U.S. 991. Similarly here, each individual applicant has the right, under Title VII, not to be subject to discrimination based on his or her individual status as a person born outside the United States.

B. The E.E.O.C. Guidelines Interpret the Statute in a Manner Consistent with the Purpose of the Statute to Accord to Individuals The Right to be Free from Discrimination in Private Employment Similar to the Rights Protected by the Fourteenth Amendment Against Infringement by the States.

Even if it be assumed that the term "national origin", as used in Title VII is unclear, it is reasonable to interpret any ambiguity in the statute in a way which accords with its fundamental purpose. *United States v. Baco-Unidisk*, 394 U.S. 784, 799; *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400.

The fundamental purpose of Title VII is to assure that every person has the chance to seek and secure employment without discrimination. As the Fifth Circuit said in one of the earliest Title VII cases, "The ethic which permeates the American dream is that a person may advance as far as his [or her] talents and . . . merit will carry him." *Miller v. International Paper Co.*, 408 F.2d 283, 294, (5th Cir.). As the district court stated in the instant case at 1207 (Pet. App. 13a):

By 42 U.S.C. § 2000e-2(a)(1) Congress meant to prohibit all invidious employment discrimination on the basis of national origin, including national ancestry, ethnic heritage, nationality and citizenship.

This Court has recently reiterated,³ in resounding terms, the right under the Fourteenth Amendment of lawfully resident aliens to be free from discrimination in state employment on account of alienage. *Sugarman v. Dougall*, — U.S. —, No. 71-1222, decided June

³ For earlier decisions to the same effect, see *Graham v. Richardson*, 403 U.S. 365; *Takahashi v. Fish & Game Commission*, 334 U.S. 410.

25, 1973; See also *In Re Griffiths*, — U.S. —, No. 71-1336, decided June 25, 1973. In the latter case, the Court quoted Mr. Chief Justice Hughes in *Truax v. Raich*, 239 U.S. 33, 41:

It requires no argument to show that the right to work for a living in the common occupations of of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

The use of that quotation, dealing with race and nationality, in the context of a decision dealing with denial of rights on the basis of alienage, indicates the interrelationship between nationality and alienage. Title VII is properly interpreted to reflect that relationship.

In a prior memorandum submitted by the United States in this matter, it was pointed out that Congress had, in other contexts, apparently interpreted the term "national origin" as not including alienage since by executive order beginning in 1943,⁴ and by Act of Congress since 1964,⁵ the federal government has been prohibited from discriminating on the basis of "national origin" even though, by the requirements of the Civil

⁴ Exec. Order 9346, 8 Fed. Reg. 7183 (1943); Exec. Order 10308, 16 Fed. Reg. 12303 (1951); Exec. Order 10479, 18 Fed. Reg. 4899 (1953); Exec. Order 10925, 26 Fed. Reg. 1977 (1961); Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11478, 34 Fed. Reg. 12985 (1969).

⁵ 5 U.S.C. 7151, originally enacted as Section 701(b) of Title VII of the Civil Rights Act of 1964.

Service Commission since 1914^{*} and in various appropriation acts, non-citizens were made ineligible for service in the federal competitive system. In light of the *Sugarman* and *Griffiths* decisions, however, it is evident that the citizenship requirement for federal service must be evaluated in terms of the special justification of the federal government to have only citizens as employees—a question on which the Court specifically declined to rule in the *Sugarman* case. Title VII also recognizes that there are situations in which citizenship may legitimately be a *bona fide* occupational qualification for employment. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), provides in pertinent part:

Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of their . . . national origin in those certain instances where . . . national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

We therefore have come to the conclusion that discrimination on the basis of alienage should properly be deemed, as the E.E.O.C. guidelines direct, to effectuate discrimination on the basis of national origin unless a *bona fide* occupational qualification is shown. No such *bona fide* qualification exists for the position of seamstress here involved.

^{*}5 C.F.R. 338.101.

C. Nothing in the Legislative History of the Statute Negates the Interpretation of the Statute Adopted by the E.E.O.C. Guidelines.

In view of the fact that the interpretation of the term "national origin" adopted by the E.E.O.C. guidelines accords with the natural meaning of the term and with the underlying purpose of the statute, that interpretation should be followed unless a contrary Congressional intent is apparent. We have already discussed the fact that a contrary intent cannot be read into the requirement of citizenship for federal employment since the justification for that policy must rest on the need for citizenship as a condition for federal employment, a consideration which does not pertain in this case. Beyond that, there is nothing in the legislative history of Title VII which would militate against the interpretation adopted in the E.E.O.C. guidelines.

The single direct definition given to "national origin" in the history of the Act—the remarks of Congressman Roosevelt, 110 Cong. Rec. 2548-2549 (1964)—to which the court below refers (Pet. App. 4a), furnishes no support for the Court's reading of the Act. Congressman Roosevelt said that national origin "means the country from which you *or* your forebears came from."⁷ (Emphasis supplied.) Since, as we have shown, discrimination against resident aliens is discrimination against those who have come from another country, this statement tends to support rather than negate the validity of EEOC's guideline. It is true that the words "or ancestry" appearing in the original bill were eliminated from the bill as submitted by the House Judiciary Com-

⁷ Congressman Roosevelt's statement concerning the term "national origin" arose in the context of a discussion in which he was distinguishing discrimination based on race from discrimination based on national origin.

mittee. There was no discussion regarding the reason for this deletion except for the House Judiciary Committee Minority Report ⁸ which states:

There is no material change in the substantive provisions of this title and its predecessor title defining 'unlawful employment practice.' Hence the general coverage of both versions is the same.

It is entirely consistent with the report to assume that the reason for the deletion was the broad scope of the term "national origin" which encompasses ancestry. As we have discussed above, discrimination against non-citizens is discrimination against persons born outside the United States. It is therefore discrimination based on national origin.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the judgment of the district court should be reinstated.

Respectfully submitted,

WILLIAM A. CAREY

General Counsel

JOSEPH T. EDDINS, JR.

Acting Associate General Counsel

BEATRICE ROSENBERG

CHARLES REISCHEL

RAMON GOMEZ

Attorneys

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

1800 G Street, N.W.

Washington, D.C. 20506

⁸ H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), 2 U.S. Code Cong. & Ad. News 2445 (1964).

Affidavit of Service

I hereby certify that on October 5, 1973, three copies of the foregoing Motion for the Equal Employment Opportunity Commission For Leave to File a Memorandum as *Amicus Curiae* and Accompanying Memorandum were mailed, postage prepaid and special delivery, to the following counsel of record:

Kenneth R. Carr
P. O. Box 9519
El Paso, Texas 79985

Jack T. Chapman
William Duncan
2000 State National Plaza
El Paso, Texas 79901

Attorneys For Respondent

Harriet Rabb
George Cooper
435 West 116th Street
New York, New York 10027

Ruben Montemayor
1414 Tower Life Building
San Antonio, Texas 78205

Attorney For Petitioners

I further certify that all parties required to be served have been served.

RAMON GOMEZ

Attorney for the Commission
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
1800 G Street, N.W.
Washington, D. C. 20506

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NO. 72-71

CECILIA BENTON AND BERNARD BENTON, Respondents

PARAN MANUFACTURING CO., INC., Respondent

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

**OFFICE OF EMPLOYMENT LAW CENTER
AMICUS CURIAE**

KENNETH HARRIS
JANAMARA FLIPPER
GERRY T. S. PARK
MICHAEL C. TONGHER
Employment Law Center
200 West Street
San Francisco, CALIFORNIA 94102

Attorneys for Amicus Curiae

Of Counsel:

MICHAEL WHITMOR
JOE BRUNTSCHER
KAY MANTWA

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA, *Petitioners*,

VS.

FARAH MANUFACTURING CO., INC., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals
For the Fifth Circuit

**BRIEF OF EMPLOYMENT LAW CENTER,
AMICUS CURIAE**

INTEREST OF AMICUS¹

The Employment Law Center, a project of the Legal Aid Society of San Francisco, provides free legal assistance to poor residents of San Francisco in a concentrated effort to secure and enhance their rights to equal employment opportunity. Enforcement and implementation of Title VII of the Civil Rights Act of

¹The letters of Petitioner and Respondent, consenting to the filing of this brief *amicus curiae* out of time, have been filed with the clerk.

1964 constitute a major portion of the Center's activity.

San Francisco's reputation as a multi-ethnic city, and as a focus of immigration, is statistically well founded. Resident aliens represent more than 10% of the city's population.² During the past ten years alone, 81,637 newly arrived aliens have established their residence in San Francisco.³ As described more fully below, resident aliens experience an inordinately high rate of unemployment. Moreover, fear of deportation and ignorance of the law commonly result in acceptance of shockingly substandard wages and working conditions. Among many of San Francisco's resident aliens, then, unemployment and underemployment are pervasive.

The Employment Law Center provides legal representation to the alien communities—most notably the Chinese, Japanese, Filipino and Spanish-language—within San Francisco and maintains close connections with the responsible leadership in these communities. The following argument draws upon the Center's experience in seeking legal solutions to the myriad employment problems encountered by San Francisco's resident aliens and, from this perspective, seeks to provide the Court with a broadened view of the considerations inherent in a resolution of this case.

²73,031 aliens in a total population of 715,673. United States Bureau of the Census, Census of Population: 1970. DETAILED CHARACTERISTICS: Final Report PC(1)-D6, California, Section 1, Table 144, p. 6-1205.

³United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972," Table 34, p. 96.

ARGUMENT

The Employment Law Center supports and adopts the arguments presented in Petitioner's Brief. The following discussion seeks to develop those arguments by reference to the employment discrimination experienced by resident aliens, because of their alienage, in San Francisco.

The Fifth Circuit's decision would seem to permit private employment discrimination on the basis of alienage even though this Court now has expressly prohibited such discrimination when the employer is a state or municipal government, *Sugarman v. Dougall*, U.S., 93 Sup.Ct. 2842 (1973).⁴ Affirmance by this Court will withdraw Title VII protection from the thousands of new immigrants—quite apart from current resident aliens—who will continue to enter the United States each year under current immigration laws.⁵ Furthermore, these laws dramatically

⁴Whatever one's assessment of the various justifications for restricting certain state government positions to citizens, those justifications are utterly irrelevant to private employment as it is involved in the case at bar. Thus, consideration of a job applicant's familiarity with the history, customs or mores of this country, or assurance of his undivided national loyalty, is simply inapposite to his suitability for employment in a clothing factory.

⁵As the Brief for Petitioner points out, Congress, through the adoption of immigration and naturalization statutes, regulates the entry of aliens. These provisions clearly establish that Congress intended aliens admitted to the United States to work. Congress, in changing from a country quota to a regional quota, 8 U.S.C. §1151 (Pub.L. 89-236), enacted October 3, 1965, was aware that many more aliens of color would be immigrating to the United States. These changes in the law occurred shortly after the adoption of the Civil Rights Act of 1964. It is inconceivable that the Congress, acting within so short a time on two important pieces of legislation, would have denied protection in the one (Civil Rights Act) to those groups whose number would certainly increase because of the other (Immigration Act).

increase the immigration of people of "color",⁶ a class of persons expressly protected by Title VII.⁷ As demonstrated below, these resident aliens of color are among those most vulnerable to the evils of employment discrimination.⁸

The number of aliens permanently residing in the United States is surprisingly large. In 1972 there were 4,421,540 aliens residing in the United States.⁹

⁶As used in this brief, "people of color" and "non-white" and "non-Caucasian" refer to the countries—and people from those countries—of Asia (excluding Israel), Africa and Central and South America (including Mexico) as listed in the United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972" Table 14, p. 54.

⁷While the word "color" in Title VII has not often been litigated and, in application, may often overlap with the word "race", it is clear that in some cases the color prohibition is broader than the race prohibition. For instance, for some purposes, such as school desegregation plans, Mexican-Americans are classified as belonging to the "white race", e.g., *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142, 146 (5th Cir. 1972). However, it is readily apparent that Mexican-Americans suffer from discrimination in much the same way that "racial" minorities do. Unless our racial categories are to be redefined, then, Mexican-Americans should be protected by the more extensive color prohibition.

It should also be noted that oftentimes color is one of the first-perceived characteristics that trigger a discriminatory response. In this way color can be the more important of the two characteristics.

⁸The U. S. Equal Employment Opportunities Commission, which is charged by Congress with the responsibility of implementing Title VII of the 1964 Civil Rights Act and effectuating national policy against discrimination in employment, has interpreted Title VII's prohibition of discrimination based on national origin as encompassing a ban on discrimination based on citizenship. 29 C.F.R. §1606.1(d). The EEOC's interpretation, based on its expertise and experience gained in implementing the Act, "is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, at 434 (1971).

⁹United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972," Table 34, p. 96.

Of these, 79.6% (3,900,059) were permanent resident aliens.¹⁰ Following long established patterns, today's immigrants are motivated by aspirations no different from those of this country's earliest settlers: they seek to escape poverty and to build a new life. However, this past decade has witnessed massive immigration not from the white countries of Europe, but rather from the poor and underdeveloped countries of Asia and Central and South America that are populated by people of color.

While more than 5,500,000 aliens of color have immigrated to this country in the 150 years beginning in 1820, over one third (37.2%) arrived only in the ten years beginning in 1963 and ending in 1972 (see appendix 1). Within this same ten year period there is a striking increase in the proportion of aliens of color as compared to white aliens admitted. Thus, in 1963, 47% of the aliens admitted into this country were people of color (see appendix 2). There is a steady increase over the years until 1972, the last year for which figures are available, when 72% of all aliens admitted were from countries populated by people of color (see appendix 2). Although this explosion of immigration by aliens of color has been a recent phenomenon, the cumulative impact is that by 1972, 52.2% (2,035,818)¹¹ of all resident aliens in the United States were from countries populated by people of color.

¹⁰*Ibid.*

¹¹"Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Table 34, at p. 96. (Permanent resident aliens exclusive of those from Europe, Oceania, Israel, Canada, South Africa, stateless and all others.)

As Petitioner argues, the stigma of alienage alone is more than enough to erect high barriers to the meaningful employment of this class of easily exploitable people. Wages and working conditions are commonly substandard, and the unscrupulous employer can maintain his advantage through unfounded—though real to the uneducated alien—threats of deportation. To add to this the further badge of color, a condition borne by 72% of the resident aliens admitted in 1972, is to make these already high barriers practically insurmountable.

As Petitioner states, Congress expressly sought to obliterate this badge of color as an obstacle to obtaining meaningful employment by enacting Title VII of the 1964 Civil Rights Act. Employers should not now be allowed to escape this prohibition by the imposition of an anti-alien policy.¹²

The cumulative effect of the invidious classifications of alienage and color is vividly illustrated by employ-

¹²To insist upon citizenship as a condition to Title VII's protections is not only without justification in the legislative history, but brings it out of conformance with other provisions of the 1964 Civil Rights Act. For instance, the public accommodations section, codified as Title II, is not restricted only to citizens. Secretary of State Dean Rusk's testimony on Title II points out the necessary concern that the protection against discrimination based on color not be limited to citizens:

"I now turn to a special concern of the Department of State: The treatment of non-white diplomats and visitors to the United States. We cannot expect the friendship and respect of non-white nations if we humiliate their representatives by denying them, say, service in a highway restaurant or city cafe.

"Under international law and through the practice of nations, a host country owes certain duties to the diplomatic

ment statistics from San Francisco. 27.6% (972,560)¹³ of all resident aliens in the United States in 1972 live in California (see appendix 3). As mentioned above, a large portion of these aliens reside in San Francisco, making up 10.2% of the city's population (73,031 aliens out of a total population of 715,673).¹⁴ Of these resident aliens, a full 72.5% (52,980)¹⁵ are people of color. During the past ten years, 81,637 aliens established residence in San Francisco (see appendix 4).¹⁶ Forty-four and a half per cent (36,324) immigrated from Mexico, the Philippines, and China alone.¹⁷

representatives which are accredited to it, in order to facilitate the discharge by those representatives of their functions. . . . These obligations are not properly discharged, in my view, unless diplomatic representatives have access, without discrimination or hindrance, to the public accommodations required by travelers in going about their business."

Hearings on S. 1732 before Senate Committee on Commerce, 88th Congress, 1st Session, ser. 26, pt. 1, at 283 (1963).

¹³"Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Table 34, p. 96.

¹⁴United States Bureau of the Census, Census of Population: 1970. DETAILED CHARACTERISTICS: Final Report PC(1)-D6, California, Section 1, Table 144, p. 6-1205.

It should be pointed out that the greater proportion of these aliens were between the ages of 18 and 64. The 1970 census figures show that 71.6% of the aliens in California and 73.9% of those in San Francisco were within this high-employability age group. Census of Population, DETAILED CHARACTERISTICS, *op.cit.*, Table 143, pp. 6-1194 and 6-1196. While the census figures do not distinguish between temporary and resident aliens, other figures indicate that 97% of all aliens in California in 1972 were resident aliens. "Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Table 35, p. 97.

¹⁵Census of Population: 1970. DETAILED CHARACTERISTICS, *op.cit.*, Table 144, p. 6-1205.

¹⁶"Report of the Commissioner of Immigration and Naturalization, 1972," *op.cit.*, Tables 12A/12B.

¹⁷*Ibid.*

That these newer groups face invidious discrimination in employment is clear from the mean and median family income figures for their racial and ethnic groupings as a whole (see appendix 5). Thus, resident aliens whose countries of origin experienced the smallest percentage of immigration in the past ten years (the European and other white countries plus Japan) had the highest mean and median family incomes.¹⁸ Conversely ethnic groups experiencing the largest percentage of immigration in the past ten years (China and the Spanish speaking countries) had the lowest mean and median family incomes (see appendix 5).¹⁹

Another reliable indicator of the problems encountered by alien groups of color is the unemployment rate. While totally precise figures are not available, the Bay Area Social Planning Council, in its report "Chinese Newcomers in San Francisco," February, 1971, fnt. I, at p. 40, estimated that 27.8% of the Chinese male immigrants in San Francisco as of January, 1969 were unemployed.²⁰

¹⁸"City/County Population Statistics and Poverty Indicators." EOC District Population Statistics and Poverty Indicators from the 1970 Census and Other Sources (Addendum dated March 15, 1973, to EOC form 205—Second Revision, January 15, 1973).

¹⁹*Ibid.*

²⁰It has recently been recognized that a more accurate indication of the employment picture is the subemployment index, which measures the percentage of workers who are unemployed or who do not earn enough to bring them and their families above the poverty level. See, e.g., 4 BNA Manpower Information Service 607 (1973). The subemployment index is generally estimated as two or three times as large as the unemployment rate.

The Council's report went on to describe the employment problems of recent Chinese immigrants, at pp. 39-41:

"Of key importance to the Chinese newcomer, if he is to take his place as a functioning member of American society, is his ability to compete in the labor market on an equal footing with other job seekers and thereby obtain employment which will enable him to provide for his own and his family's economic needs and dignity. Unfortunately, for many of San Francisco's Chinese newcomers, this is not a likely prospect.

* * *

"Because of their lack of English ability, most new arrivals seek employment in Chinatown firms where low wages and long hours often prevail. Such employment, while providing the immigrant with some means of support, may actually mitigate against his chances of entering the general labor market. The newcomer in effect becomes locked into a system which limits his contacts to other Chinese-speaking persons, requires him to work long hours for subsistence, and leaves him little time to upgrade his skills by participating in English and vocational education classes."

Unfortunately, such problems are not peculiar to Chinese immigrants but are encountered in similar form by other alien groups.

CONCLUSION

For the reasons indicated above, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for the granting of appropriate relief.

Dated, San Francisco, California,
October 5, 1973.

Respectfully submitted,

KENNETH HECHT

CASSANDRA FLIPPER

COREY Y. S. PARK

MICHAEL C. TOBRINER

Employment Law Center

795 Turk Street

San Francisco, California 94102

Attorneys for Amicus Curiae

Of Counsel:

MICHAEL WETMORE

JOE BREITENEICHER

KAZ MANTWA

APPENDIX 1

NUMBER AND PERCENT OF RESIDENT ALIENS
ADMITTED, 1920-1972 and 1963-1972. (a)

Countries of Origin	A 1920-1972	B 1963-1972	C 1963-1972 Immigration as a % of 1920-1972 Immigration
Caucasian	39,931,044	1,465,955	3.7%
Non-Caucasian	5,790,898	2,055,902	37.2%
All Asia	1,898,689	624,497	32.8%
China Taiwan Hong Kong	459,411	153,126	33.3%
Japan	375,070	39,525	10.5%
Phillipines	(b)	153,327	82.6% (c)
All Africa	87,789	48,735	55.5%
Mexico	1,707,125	460,521	27.0%
All Other Central and South America	3,804,420	1,398,090	36.7%

a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972" Tables 13 and 14 p. 51-54.

b) No accurate figures for 1920-1972.

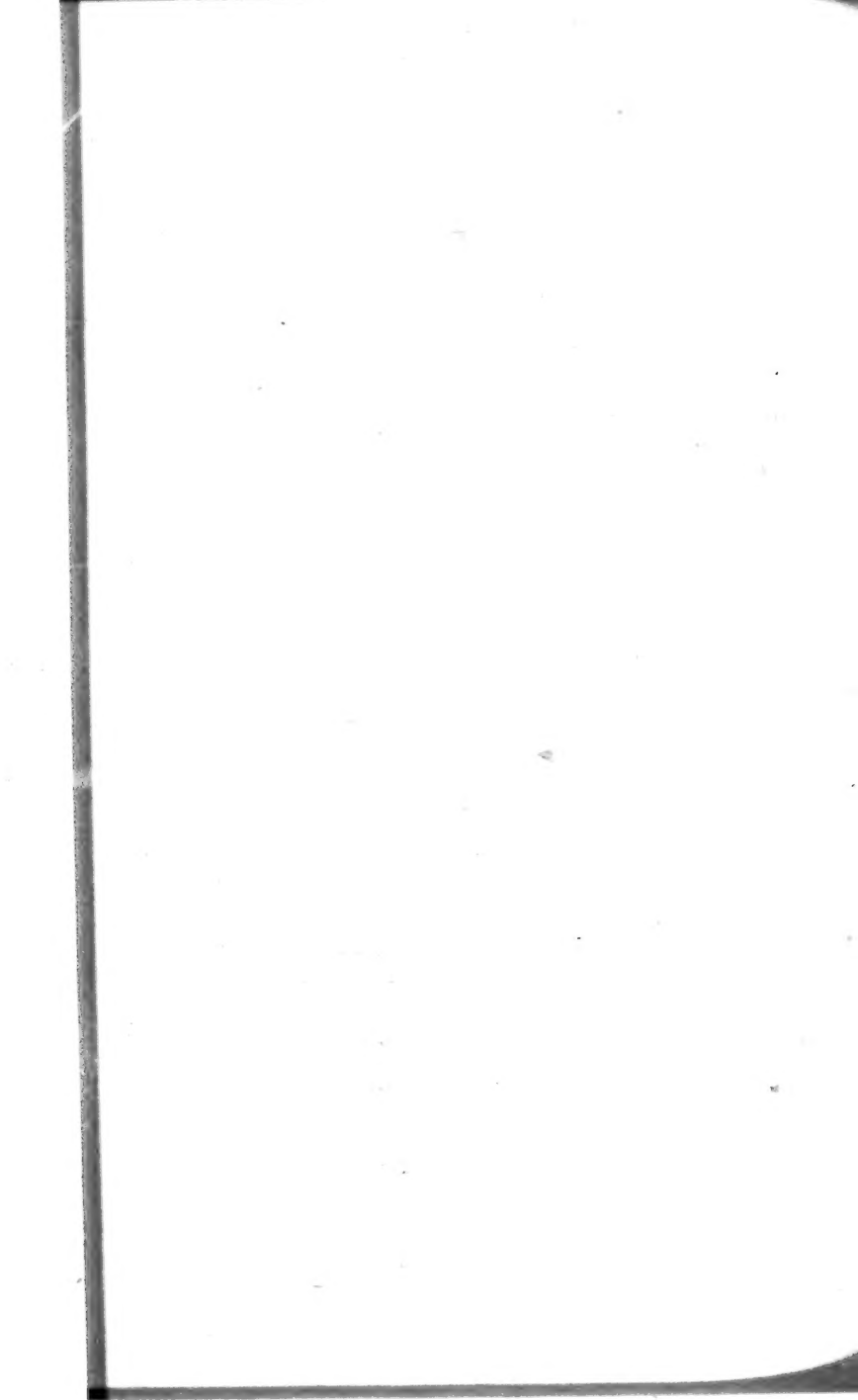
c) % derived by dividing 1968-1972 sub-total into 1963-1972 total:
 1963-1967. . . 26,712
 1968-1972. . . 126,525

APPENDIX 2

NUMBER AND PERCENTAGE OF RESIDENT
ALIENS ADMITTED FOR YEARS ENDING
JUNE 30, 1963-1972 (a)

Countries of Origin	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972
Total	306260	292248	296697	323040	361972	454448	358579	373326	370478	384685
Caucasian	163428	162455	154149	154592	164555	169996	141301	135025	114298	106156
"	53	56	52	48	45	37	39	36	31	28
Non-Caucasian	142956	129793	142548	168448	197417	284452	217278	238301	256180	278529
"	47	44	48	52	55	63	61	64	69	72
All Asia (except Israel)	23696	20905	19801	40493	59965	57000	73630	92903	102722	118959
China										
Taiwan	5370	5648	4769	17608	25096	16434	20893	17956	17622	21730
Hong Kong										
Korea	2580	2362	2165	2492	3956	3811	6045	9314	14297	18876
Philippines	3618	3006	3130	6093	10865	16731	20744	31203	28471	29376
Japan	4056	3680	3180	3394	3946	3613	3957	4485	4457	4757
Mexico	55253	32967	37969	45163	42371	43563	44623	44469	50103	54040
Other Cent. ral and South Amer.	38449	51932	50433	53819	74325	156835	69221	70841	76883	69559

(a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization, 1972" Table 54.



APPENDIX 3

NUMBER AND PERCENT OF RESIDENT ALIENS IN
UNITED STATES AND CALIFORNIA. PLUS NUMBER
AND PERCENT OF NON-CAUCASIAN RESIDENT ALIENS
IN CALIFORNIA, 1963-1972. (a)

	A Number of Resident Aliens in U.S.	B Number of Resident Aliens in Calif.	C Calif. Aliens as a % of U.S. Aliens	D Number of Non-Caucasian Aliens in Calif.	E Non-Caucasian Aliens in Calif. As a % of Total Aliens in Calif.
1972	3,900,059	972,560	27.6%	677,488	69.7%
1971	3,679,502	930,074	25.3%	638,841	68.7%
1970	3,719,750	916,365	24.6%	604,810	66.0%
1969	3,506,359	871,585	24.9%	558,701	64.1%
1968	3,405,177	858,674	25.2%	527,160	61.4%
1967	3,210,768	808,240	25.2%	491,591	60.8%
1966	3,088,133	795,187	25.7%	477,475	60.0%
1965	3,024,278	756,841	25.0%	447,558	59.1%
1964	2,966,732	717,280	24.2%	411,122	57.3%
1963	2,892,015	665,558	23.0%	372,412	55.9%

(a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization; 1963-1972, Table 34.

APPENDIX 4

RESIDENT ALIENS ADMITTED, BY COUNTRY OF
BIRTH, WHOSE INITIAL RESIDENCE IN
UNITED STATES WAS IN SAN FRANCISCO,
YEARS ENDING JUNE 30, 1963-1972 (a)

	All countries	Mexico	Phillipines	China Hong Kong Taiwan
Total	81,637	4000	16,447	15,877
1972	8464	398	2846	1434
1971	6997	347	2593	820
1970	9933	321	3693	1605
1969	8894	300	2368	2205
1968	7986	425	1768	1653
1967	8583	467	1179	2883
1966	8969	392	886	3181
1965	6961	425	377	706
1964	7362	368	340	640
1963	7576	557	397	750

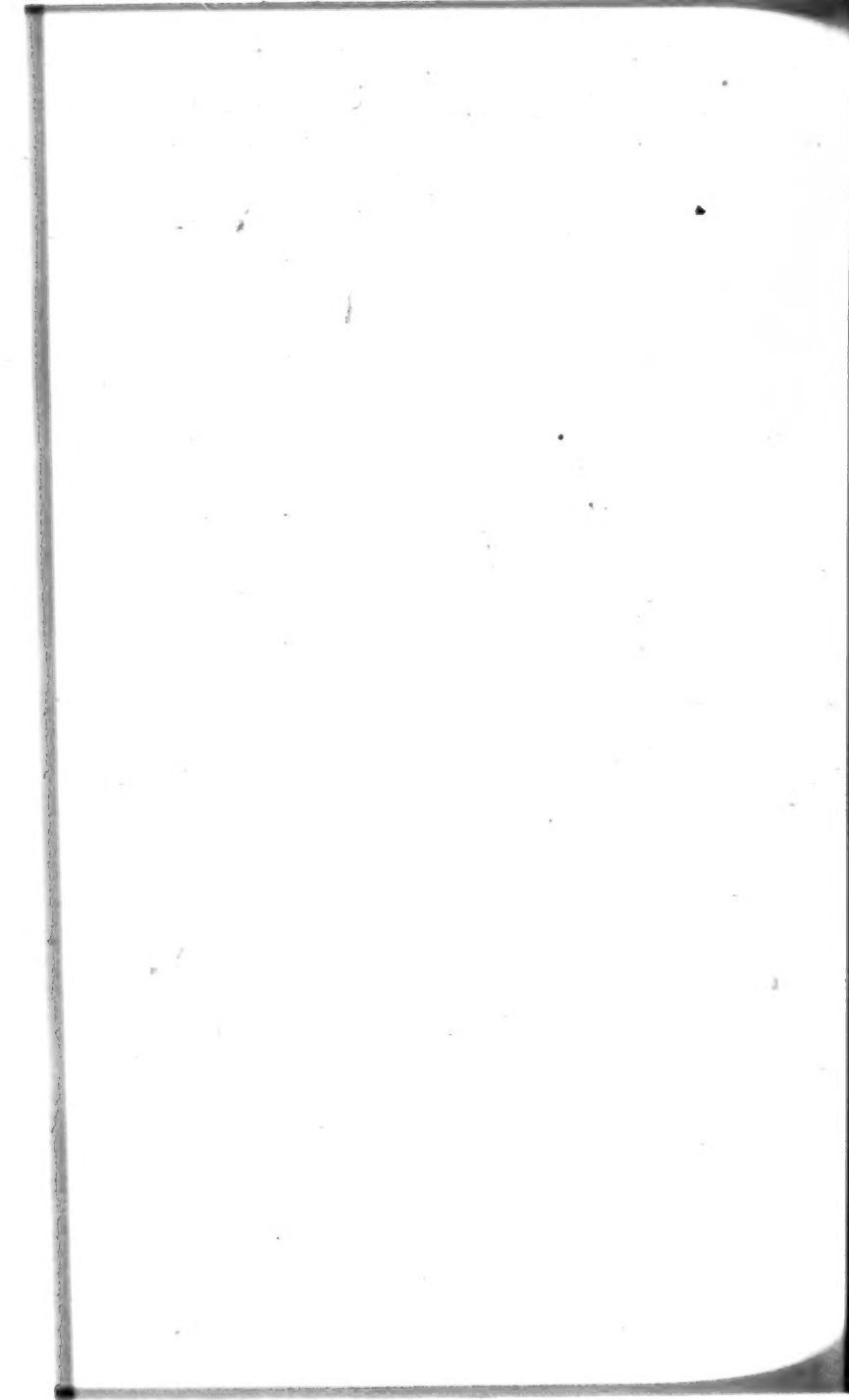
(a) From United States Department of Justice, Immigration and Naturalization Service, "Report of the Commissioner of Immigration and Naturalization" 1963-1972, Tables 12A, 12B, 13.

APPENDIX 5

MEAN AND MEDIAN FAMILY INCOME, RACIAL
AND ETHNIC GROUPS IN SAN FRANCISCO, 1970
(a)

	All Races	Black	Chinese	Japanese	Spanish Language	White
Median Family Income	\$10,495	\$7676	\$9879	\$11,545	\$9488	\$11,140
Mean Family Income	\$12,339	\$8535	\$10,986	\$12,323	\$10,366	\$13,311

(a) From "City/County Population Statistics and Poverty Indicators." EOC District Population Statistics and Poverty Indicators From the 1970 Census and Other Sources (Addendum dated March 15, 1973, to EOC form 205--Second Revision, January 15, 1973.)



NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ESPINOZA ET VIR V. FARAH MANUFACTURING CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-671. Argued October 10-11, 1973—

Decided November 19, 1973

Petitioners, Mrs. Espinoza and her husband, brought suit after exhausting their administrative remedies with the Equal Employment Opportunity Commission (EEOC), alleging that respondent's refusal to hire Mrs. Espinoza in its San Antonio division because of her Mexican citizenship violated § 703 of Title VII of the Civil Rights Act of 1964, which makes it an unlawful employment practice for an employer to fail or refuse to hire any individual because of his race, color, religion, sex, or national origin. The District Court granted petitioners' motion for summary judgment, relying primarily on an EEOC guideline providing that a lawful alien resident may not be discriminated against on the basis of citizenship. The Court of Appeals reversed. *Held*: An employer's refusal to hire a person because he is not a United States citizen does not constitute employment discrimination on the basis of "national origin" in violation of § 703. Pp. 2-10.

(a) In light of the statute's legislative history and the long-standing practice of requiring federal employees to be United States citizens, it is clear that Congress did not intend the term "national origin" to embrace citizenship requirements. Pp. 3-5.

(b) The EEOC's guideline, though perhaps significant in a wide range of other situations, does not apply here or support the premise that discrimination on the basis of citizenship is tantamount to discrimination on the basis of national origin, since there is no showing that respondent (96% of whose San Antonio division employees are Mexican-Americans) discriminated against persons of Mexican origin. Pp. 6-8.

Syllabus

(c) Though the Act protects aliens against illegal discrimination because of race, color, religion, sex, or national origin, it does not proscribe discrimination on the basis of alienage. P. 9.

462 F. 2d 1331, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-671

Cecilia Espinoza and Rudolfo
Espinoza, Petitioners,
v.
Farah Manufacturing Company,
Inc.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[November 19, 1973]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves interpretation of the phrase "national origin" in Title VII of the Civil Rights Act of 1964. Petitioner Cecilia Espinoza is a lawfully admitted resident alien who was born in and remains a citizen of Mexico. She resides in San Antonio, Texas, with her husband, Rudolfo Espinoza, a United States citizen. In July, 1969, Mrs. Espinoza sought employment as a seamstress at the San Antonio division of respondent Farah Manufacturing Company. Her employment application was rejected on the basis of a long-standing company policy against the employment of aliens. After exhausting their administrative remedies with the Equal Employment Opportunity Commission,¹ petitioners commenced this suit in the District Court alleging that respondent had discriminated against Mrs. Espinoza because of her "national origin" in violation of § 703 of Title VII, 42 U. S. C. § 2000e-2 (a)(1). The District Court granted petitioners' motion for summary judgment, holding that a refusal to hire because of lack of citizenship constitutes

¹Section 706 (e), 42 U. S. C. § 2000e-5 (e).

discrimination on the basis of "national origin." 343 F. Supp. 1205. The Court of Appeals reversed, concluding that the statutory phrase "national origin" did not embrace citizenship. 462 F. 2d 1331. We granted the writ to resolve this question of statutory construction, 411 U. S. 946, and now affirm.

Section 703 makes it "an unlawful employment practice . . . for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin." Certainly the plain language of the statute supports the result reached by the Court of Appeals. The term "national origin" on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.²

² See, e. g., Minnesota State Act Against Discrimination, MINN. STAT. 363.01, Subd. 6 (1971), defining "national origin" as "the place of birth of an individual or any of his lineal ancestors."

Several States have statutes making it illegal to discriminate on the basis of national origin, and many of these statutes have apparently been interpreted by the appropriate state enforcement agency as not barring citizenship requirements. For example, the New York Human Rights Law provides that it is an unlawful discriminatory practice to refuse to hire any individual because of his or her origin and additionally provides that it shall be unlawful for an employer to make any pre-employment inquiry "which expresses directly or indirectly, any limitation, specification or discrimination as to . . . national origin . . ." N. Y. EXECUTIVE LAW § 296 (McKinney 1972). The New York State Commission Against Discrimination has ruled that an employer may lawfully ask a job applicant whether he or she is a citizen of the United States. See 3 CCH EMPLOYMENT PRACT. GUIDE ¶ 26,051, at 8899.

While these interpretations of state statutes do not control our construction of federal law, we think them indicative of a general understanding that the term "national origin" does not embrace a requirement of United States citizenship.

The statute's legislative history, though quite meager in this respect, fully supports this construction. The only direct definition given the phrase "national origin" is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: "It means the country from which you or your forebears come from. You may come from Poland, Czechoslovakia, England, France, or any other country." 110 Cong. Rec. 2548-49 (1964). We also note that an earlier version of § 703 had referred to discrimination because of "race, color, religion, national origin, or *ancestry*." H. R. 7152, 88th Cong., 1st Sess., § 804, Oct. 2, 1963 (Comm. print) (emphasis added). The deletion of the word "ancestry" from the final version was not intended as a material change, see H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963), at 87, suggesting that the terms "national origin" and "ancestry" were considered synonymous.

There are other compelling reasons to believe that Congress did not intend the term "national origin" to embrace citizenship requirements. Since 1914, the Federal Government itself, through Civil Service Commission regulations, has engaged in what amounts to discrimination against aliens by denying them the right to enter competitive examination for federal employment. Executive Order No. 1997 (1914); see 5 U. S. C. § 3301; 5 CFR § 388.101 (1972). But it has never been suggested that the citizenship requirement for federal employment constitutes discrimination because of national origin, even though since 1943, various executive orders have expressly prohibited discrimination on the basis of national origin in federal government employment. See, *e. g.*, Exec. Order 9346, 8 Fed. Reg. 7183 (1943); Exec. Order 11478, 34 Fed. Reg. 12985 (1969).

Moreover, § 701 (b) of Tit. VII, in language closely paralleling § 703, makes it "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of . . . national origin" Civil Rights Act of 1964, P. L. 88-352, § 701 (b), 78 Stat. 254, reenacted, P. L. 89-554, 80 Stat. 523 (1966), 5 U. S. C. 7151. The legislative history of that section reveals no mention of any intent on Congress' part to reverse the long-standing practice of requiring federal employees to be United States citizens. To the contrary, there is every indication that no such reversal was intended. Congress itself has on several occasions since 1964 enacted statutes barring aliens from federal employment. The Treasury, Postal Service, and General Appropriation Act of 1973, for example, provides that "no part of any appropriation contained in this or any other Act shall be used to pay compensation of any officer or employee of Government of the United States . . . unless such person is a citizen of the United States."³ P. L. 92-351, § 602, 86 Stat. 471 (1972). See also P. L. 91-144, § 502, 83 Stat. 336-337 (1970); P. L. 91-439, § 502, 84 Stat. 902 (1970).

To interpret the term "national origin" to embrace citizenship requirements would require us to conclude that Congress itself has repeatedly flouted its own declaration of policy. This Court cannot lightly find

³ Petitioners argue that it is unreasonable to attribute any great significance to these provisions in determining Congressional intent because the barrier to employment of noncitizens has been tucked away in appropriations bills rather than expressed in a more affirmative fashion. We disagree. Indeed, the fact that Congress has occasionally enacted exceptions to the general barrier indicates to us that Congress was well aware of what it was doing. See, e. g., P. L. 92-204, § 703, 85 Stat. 726 (1971) (Department of Defense); P. L. 91-382, 84 Stat. 823 (1970) (Library of Congress).

such a breach of faith. See *Bate Refrigerator Co. v. Sulzberger*, 157 U. S. 1, 38 (1895). So far as federal employment is concerned, we think it plain that Congress has assumed that the ban on national origin discrimination in § 701 (b) did not effect the historical practice of requiring citizenship as a condition of employment. See *First National Bank v. Missouri*, 263 U. S. 640, 658 (1924). And there is no reason to believe Congress intended the term "national origin" in § 703 to have any broader scope. Cf. *King v. Smith*, 392 U. S. 309, 330-331 (1968).

Petitioners have suggested that the statutes and regulations discriminating against noncitizens in federal employment are unconstitutional under the Due Process Clause of the Fifth Amendment. We need not address that question here,⁴ for the issue presented in this case is not whether Congress has the power to discriminate against aliens in federal employment, but rather, whether Congress intended to prohibit such discrimination in private employment. Suffice it to say that we cannot conclude Congress would at once continue the practice of requiring citizenship as a condition of federal employment and, at the same time, prevent private employers from doing likewise. Interpreting § 703 as petitioners suggest would achieve the rather bizzare result of preventing Farah from insisting on United States citizenship as a condition of employment while the very agency charged with enforcement of Tit. VII would itself be required by Congress to place such a condition on its own personnel.

⁴ We left this question undecided in *Sugarman v. Dougall*, — U. S. —, — n. 12 (1973). See *Jalil v. Hampton*, 148 U. S. App. D. C. 415, 460 F. 2d 923, cert. denied, 409 U. S. 887 (1972); *Mow Sun Wong v. Hampton*, 333 F. Supp. 527 (N. D. Cal. 1971).

The District Court drew primary support for its holding from an interpretative guideline issued by the Equal Employment Opportunity Commission, which provides:

"Because discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship" 29 CFR § 1606.1 (d) (1972).

Like the Court of Appeals, we have no occasion here to question the general validity of this guideline insofar as it can be read as an expression of the Commission's belief that there may be many situations where discrimination on the basis of citizenship would have the effect of discriminating on the basis of national origin. In some instances, for example, a citizenship requirement might be but one part of a wider scheme of unlawful national origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971).

It is equally clear, however, that these principles lend no support to petitioners in this case. There is no indication in the record that Farah's policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin.⁵ It is con-

⁵ There is no suggestion, for example, that the company refused to hire aliens of Mexican or Spanish-speaking background while hiring those of other national origins. Respondent's president

ceded that Farah accepts employees of Mexican origin, provided the individual concerned has become an American citizen. Indeed, the District Court found that persons of Mexican ancestry make up more than 96% of the employees at the company's San Antonio division, and 97% of those doing the work for which Mrs. Espinoza applied. While statistics such as these do not automatically shield an employer from a charge of unlawful discrimination, the plain fact of the matter is that Farah does not discriminate against persons of Mexican national origin with respect to employment in the job Mrs. Espinoza sought. She was denied employment not because of the country of her origin, but because she had not yet achieved United States citizenship. In fact the record shows that the worker hired in place of Mrs. Espinoza was a citizen who was Spanish surnamed.

The Commission's guideline may have significance for a wide range of situations, but not for a case such as this where its very premise—that discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin—is not borne out.* It is

informed the EEOC's Regional Director investigating the charge that once in its history the company had made a single exception to its policy against hiring aliens, but the nationality of the individual concerned is not revealed in the record. While the company asks job applicants whether they are United States citizens, it makes no inquiry as to their national origin.

* It is suggested that a refusal to hire an alien always disadvantages that person because of the country of his birth. A person born in the United States, the argument goes, automatically obtains citizenship at birth, while those born elsewhere can acquire citizenship only through a long and sometimes difficult process. See 8 U. S. C. §§ 1427 (a), 1430, 1423 (1), and 1423 (2). The answer to this argument is that it is not the employer who places the burdens of naturalization on those born outside the country, but Congress itself, through laws enacted pursuant to its constitutional power

also significant to note that the Commission itself once held a different view as to the meaning of the phrase "national origin." When first confronted with the question, the Commission, through its General Counsel, said: "'National origin' refers to the country from which the individual or his forbears came . . . , not to whether or not he is a United States citizen" EEOC General Counsel's Opinion Letter, 1 CCH Employment Practice Guide ¶ 1220.20 (1967).⁷ The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference, *Griggs v. Duke Power Co.*, *supra*, 401 U. S., at 434; *Phillips v. Martin Marietta Corp.*, 400 U. S. 542, 545 (1970) (MARSHALL, J., concurring), but that deference must have limits where, as here, application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question. Courts need not defer to an administrative construction of a statute where there are "compelling indications that it is wrong." *Red Lion Broad-*

"To establish an uniform Rule of Naturalization." U. S. CONST., Art. 1, § 8, cl. 4.

Petitioners' reliance on *Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971), is misplaced for similar reasons. In *Phillips* we held it unlawful under § 703 to have "one hiring policy for women and another for men" 400 U. S., at 544. Farah, however, does not have a different policy for the foreign born than for those born in the United States. It requires of all that they be citizens of the United States.

⁷ The Opinion Letter was addressed to the question whether it was lawful to discriminate against nonresident aliens in favor of citizens and resident aliens, and expressly reserved any decision "regarding discrimination in favor of United States citizens and against resident aliens." Nevertheless, the definition of "national origin" set forth in the Letter is inconsistent with that suggested by petitioners here.

casting Co. v. FCC, 395 U. S. 367, 381 (1969); see also *Zuber v. Allen*, 396 U. S. 168, 193 (1969); *Volks-wagenwerk Aktiengesellschaft v. FMC*, 390 U. S. 261, 272 (1968).

Finally, petitioners seek to draw support from the fact that Tit. VII protects all individuals from unlawful discrimination, whether or not a citizen of the United States. We agree that aliens are protected from discrimination under the Act. That result may be derived not only from the use of the term "any individual" in § 703, but also as a negative inference from the exemption in § 702, which provides that Tit. VII "shall not apply to an employer with respect to the employment of aliens outside any State" 42 U. S. C. § 2000e-1. Title VII was clearly intended to apply with respect to the employment of aliens inside any State.*

The question posed in the present case, however, is not whether aliens are protected from illegal discrimination under the Act, but what kinds of discrimination the Act makes illegal. Certainly it would be unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background but refusing to hire those of Mexican or Spanish ancestry. Aliens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.


We agree with the Court of Appeals that neither the

* "Title VII of the Civil Rights Act of 1964 protects all individuals, both citizens and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin."

29 CFR § 1606.1 (c) (1972).

language of the Act, nor its history, nor the specific facts of this case indicate that respondent has engaged in unlawful discrimination because of national origin.*

Affirmed.



* Petitioners argue that respondent's policy of discriminating against aliens is prohibited by 42 U. S. C. § 1982 which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This issue was neither raised before the courts below nor presented in the petition for a writ of certiorari. Accordingly we express no views thereon.

SUPREME COURT OF THE UNITED STATES

No. 72-671

Cecilia Espinoza and Rudolfo
Espinoza, Petitioners,
v.
Farah Manufacturing Company,
Inc.

On Writ of Certiorari
to the United States
Court of Appeals for
the Fifth Circuit.

[November 19, 1973]

MR. JUSTICE DOUGLAS, dissenting.

It is odd that the Court which holds that a State may not bar an alien from the practice of law¹ or deny employment to aliens² can read a federal statute that prohibits discrimination in employment on account of "national origin" as to permit discrimination against aliens.

Alienage results from one condition only: being born outside the United States. Those born within the country are citizens from birth. It could not be more clear that Farah's policy of excluding aliens is *de facto* a policy of preferring those who were born in this country. Therefore the construction placed upon the "national origin" provision is inconsistent with the construction this Court has placed upon the same Act's protections for persons denied employment on account of race or sex.

In connection with racial discrimination we have said that the Act prohibits "practices, procedures or tests neutral on their face, and even neutral in terms of intent," if they create "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate in-

¹ *In re Griffiths*, — U. S. — (decided June 25, 1973).

² *Sugarman v. Dougall*, — U. S. — (decided June 25, 1973).

vidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U. S. 424, 430-431 (1971) (emphasis added). There we found that the employer could not use test- or diploma requirements which on their face were racially neutral, when in fact those requirements had a *de facto* discriminatory result and the employer was unable to justify them as related to job performance. The tests involved in *Griggs* did not eliminate all Blacks seeking employment, just as the citizenship requirement here does not eliminate all applicants of foreign origin. Respondent here explicitly conceded that the citizenship requirement is imposed without regard to the alien's qualifications for the job.

These petitioners against whom discrimination is charged are Chicanos. But whether Brown, Yellow, Black, or White, the thrust of the Act is clear: alienage is no barrier to employment here. *Griggs*, as I understood it until today, extends its protective principles to all, not to Blacks alone. Our cases on sex discrimination under the Act yield the same result as *Griggs*. See *Philipps v. Martin Marietta Corp.*, 400 U. S. 542 (1971).

The construction placed upon the statute in the majority opinion is an extraordinary departure from prior cases, and it is opposed by the Equal Employment Opportunity Commission, the agency provided by law with the responsibility of enforcing the Act's protections. The Commission takes the only permissible position, that discrimination on the basis of alienage *always* has the effect of discrimination on the basis of national origin. Refusing to hire an individual because he is an alien "is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII." Com-

mission's brief as *amicus curiae*, pp. 4-5. The Commission's interpretation of the statute is entitled to great weight.

There is no legislative history to cast doubt on this construction.³ Indeed any other construction flies in the face of the underlying congressional policy of removing "artificial, arbitrary, and unnecessary barriers to employment." *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 806 (1973).

This petitioner is a permanent resident alien, married to an American citizen, and her children will be native-born American citizens. But that first generation has the greatest adjustments to make to their new country. Their unfamiliarity with America makes them the most vulnerable to exploitation and discriminatory treatment. They of course have the same obligation as American citizens to pay taxes, and they are subject to the draft on the same basis. But they have never received equal treatment in the job market. Writing of the immigrants of the late 1800's, Oscar Handlin has said:

"For want of an alternative, the immigrants took the lowest places in the ranks of industry. They suffered in consequence from the poor pay and mis-

³ The only legislative history the majority point to is Congressman Roosevelt's definition of "national origin." "It means the country which you or your forebears come from. You may come from Poland, Czechoslovakia, England, France, or any other country." *Supra*, at —. But that only makes clear what petitioners here argue—that she cannot be discriminated against because she comes from a foreign country. The majority's mention of the deletion of the word "ancestry," *supra*, at —, is certainly irrelevant. Obviously "national origin" comprehends "ancestry," but as Congressman Roosevelt pointed out it means more—not only where one's forebears were born, but where one himself was born.

erable working conditions characteristic of the sweat shop and the homework in the garment trades and in cigar making. But they were undoubtedly better off than the Irish and Germans of the 1840's for whom there had been no place at all." O. Handlin, *The Newcomers* 24 (1959).

The majority decide today that in passing sweeping legislation guaranteeing equal job opportunities, the Congress intended to help only the immigrant's children, excluding those "for whom there is no place at all." I cannot impute that niggardly intent to Congress.

